Supreme Court, U.S.
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No. (1) 99 702

In The
Supreme Court of the United States

CAPITAL LEASING OF OHIO, INC.,
Petitioner,

v.

COLUMBUS MUNICIPAL AIRPORT AUTHORITY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

1. Does an airport authority, a statutorily created governmental entity, violate the constitutional equal protection rights of certain airport concessionaires where the Authority unilaterally and arbitrarily (a) creates an arbitrary class of concessionaires, and (b) imposes upon only certain members of that class a fee for use of the Authority's property of not only a percentage of income derived from Airport-related business, but also an additional fee consisting of an arbitrary percentage of all the concessionaire's income derived from the concessionaire's business wholly unrelated to the Airport's property or operations, where the additional fee so imposed, contrary to state and constitutional law, has no reasonable relationship to either any burden on the Authority's Airport facility or benefit to the concessionaire from the Authority's Airport property?

2. Is there any entitlement to a judicial presumption of deference (as is typically given to a legislative body where a court makes an equal protection violation analysis) to the decision of an administrator/functionary making an arbitrary, unilateral determination on behalf of state governmental entity to (a) create an arbitrary class of concessionaires, and (b) impose upon only certain members of that class a fee for use of the Authority's property of not only a

percentage of income derived from the Airport related business, but also an additional fee consisting of an arbitrary percentage of all the concessionaire's income derived from the concessionaire's business wholly unrelated to the Airport's property or operations, where the additional fee so imposed, contrary to state and constitutional law, has no reasonable relationship to either any burden on the Authority's Airport facility or benefit to the concessionaire from the Authority's Airport property?

3. Is an airport authority, a state governmental entity, entitled to exercise extra-territorial jurisdiction and to unbridled and arbitrary discretion in the establishment of different fees for concessionaires similarly situated for use of Authority property where the fees so imposed, contrary to state and constitutional law, have no reasonable relationship to either any burden on the Authority's Airport facility or benefit to the concessionaire from the Authority's Airport property?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Capital Leasing of Ohio, Inc. has neither parent nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Capital Leasing of Ohio, Inc. dba Budget Rent-A-Car respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on June 18, 1999, and was not recommended for publication. *Appendix A.* The trial court's decision was filed on July 15, 1998, and reported as *Capital Leasing of Ohio, Inc. v. Columbus Municipal Airport Authority*, 13 F.Supp. 2d 640 (S.D.Ohio 1998). *Appendix B.* The trial court's unpublished judgment was filed on July 15, 1998. *Appendix C.*

JURISDICTION

This case arises from the trial court's refusal to follow this Court's decisions in *Wheeling Steel Corp.* v. *Glandler*, 337 U.S. 562 (1949), *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 527 (1959), and their progeny providing equal protection to citizens by requiring that the Authority proceed upon a rational basis and not resort to palpably arbitrary classifications of

concessionaires and so prohibit the Authority's imposition of additional fees consisting of a portion of the concessionaire's income unrelated to the Authority's Airport business locations or transactions upon only certain members of a class of concessionaires. While the Court below correctly acknowledged the applicability of equal protection rights to the concessionaire's disparate treatment, it failed correctly to apply the applicable standard necessary to justify the Authority's disparate treatment in allowing the Authority the unfettered right to require concessionaires to adhere to a "take it or leave it" requirement to pay an additional fee for the use of Airport space consisting of a percentage of the concessionaire's non-Airport income.

Further, in contrast with the established standards of judicial deference to legislative decisions discussed in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976), the issue here is whether a state governmental entity such as the Airport Authority and similar governmental entities, which are administrative and *not* legislative entities, may exercise arbitrary discretion *vel non*, and whether *any* degree of judicial deference to such arbitrary administrative decisions is warranted where the decision is not the product of a legislatively-generated determination. The significance of this distinction can not be overstated because the issue is especially crucial where the decision under scrutiny is a purely revenue-

raising decision and is akin to, or has the effect of, a tax. This is certainly an open issue, if not one of first impression. The impact of these types of administrative, unilaterally imposed revenue-generation decisions constitutes not only an increasingly significant component of a given municipality's or state's economy, but also a significant portion of interstate commerce and travel.

The case before the Court is thus uniquely positioned for a clear decision upon these nationally important points in a new, pervasive, and insidious context because the Authority here unabashedly claims the right, through the exercise of (i) extra-territorial jurisdiction and (ii) a purely arbitrary discretion of an unelected administrative functionary, to impose virtually unlimited additional fees upon certain concessionaires using a structure frankly described as whatever the market will bear, without any consideration of, much less compliance with, the constitutionally and state law mandated standard of a reasonable relationship to either the burden upon the Authority or the benefit to the concessionaire. The Court cannot permit, as did the Courts below, this type of delegated, unbridled right to be coupled with the *de facto* power of such an authority to impose whatever it can get away with, a concept which mortally offends even the minimal equal

protection rights to which such governmental economic functions are subject.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law" and is set forth in Appendix G. The statute from which the Authority derives its authority to impose fees is set forth in Appendix I.

STATEMENT OF THE CASE

Petitioner Capital Leasing of Ohio, Inc., doing business as Budget ("Budget") operates nine car rental facilities in the Columbus, Ohio area. *Appendix D-6.* One of Budget's rental car service facilities is located near, but not on, the property (the "Airport") of Respondent Columbus Municipal Airport Authority (the "Authority"). *Appendix D-7.* The Authority is a public entity that exists and operates under the authority of and exercises the power granted by Chapter 4582 of the Ohio Revised Code, Ohio Rev.Code §§ 4582.01 *et seq.* *Appendix I.*

Budget has operated a car rental concession at the Airport since 1982, including through a sales counter at the Airport terminal. *Appendix B-4.* Currently, although there is sales counter space available in the terminal for some concessionaires to enter into rental agreements, no rental cars are available at the Airport terminal itself. *Appendix B-5.* All customers must be shuttled to and from a given rental agency's storage location to pick up or drop off cars. *Appendix B-5.* Some concessionaires use sales counters in the terminal and have their facilities on or off the Authority property, others use no sales counters and have facilities on the Authority property, still others have neither sales counters nor facilities on the Authority property. *Appendix B-4 to B-6.* Budget has a counter on the Authority property, but its car rental facility is located off the Authority property. *Appendix B-5.*

Other concessionaires (such as food concessionaires) have sales space at the terminal, but no other facilities. *Appendix B-5 to B-6.* Yet other concessionaires (courier companies, for example) have no physical presence at the terminal, but use space at the terminal. *Appendix D-42 to D-43.* Currently, each of these categories of concessionaires is required to pay a different fee for the use or access to the Authority's Airport property.

It was Budget's understanding that prior rental concession agreements provided for a fee consisting of,

essentially, a percentage of business originating or concluding at the Airport with certain exclusions. Thus, whether a concessionaire had facilities exclusively on Airport property, such as the type of service facility operated by an operator such as Hertz ("on-airport") or one operated off the Airport property such as the one operated by Budget ("off-airport"), concession fees were directly and exclusively related to Airport generated business ("Airport Business"). *Appendix D-6.* Income generated from business that was not Airport related, such as local customers who simply rented or returned cars at the Budget off-airport facility ("Local" customers) was not included in the calculation of the fees for Budget's use of and access to the Airport ("Non-Airport Business"). Such business constitutes more 40% of the business conducted by Budget at its off-airport facility. *Appendix B-17.*

In contemplation of the Authority building a new terminal garage that would allow for concessionaires' rental cars to be picked up and dropped off at the terminal, the Authority required new mandatory concession agreements with rental car companies. *Appendix D-18.* It is these new agreements which were the source of the disputes before the Court. In particular, the fee imposed upon Budget, for the first time, seeks to capture directly an arbitrary percentage of all business generated at Budget's off-airport facility

(both Non-Airport Business and Airport Business), not just that business generated at or related to air travelers who rent at the Airport.

The Authority accomplishes this goal through the artifice of its requirement that rental car companies renting counter space and garage space under the new concession agreement designate a "Service Facility" which would, at most, be used essentially only for the storage and service of Airport rental cars. *Appendix H-14.* No Airport Business customer will visit or engage in any business at the Service Facility. *Appendix B-21 to B-22.* Thus, for operators of off-airport facilities, such as Budget, who can or do generate significant Non-Airport Business at their Service Facility, these new mandatory provisions require that the operator pay as a concession fee a percentage not only of all income generated at both the sales counter and at the Airport, but also at the Service Facility, notwithstanding that, as is the case with Budget's off-airport service facility, *only* Non-Airport Business income will be generated at the service facility.

The new concession agreement also provides that any facility which the car rental concessionaire operates within two miles of its "Designated Service Facility" will be considered part of the car rental concessionaire's "Airport" operations. *Appendix H-14.* As a result, the new concession agreement requires concessionaires with off-airport designated service facilities, such as Budget,

to pay not only a percentage of its Airport Business as well as separate rent for garage space and counter space, but also a percentage of Non-Airport Business to the Authority as a fee for transacting business in the Airport terminal. *Appendix H.*

The Authority required all bidders for the new concession agreement to submit a fully signed and executed concession agreement with their bids. *Appendix D-18.* Failure to submit a bid without a signed copy of the new concession agreement would have resulted in outright rejection of the bid. *Appendix B-13.* Thus, rather than a negotiated or arm's-length agreement, the concession agreement is a unilaterally imposed contract, a "take it or leave it" proposition determined by the Authority. Further, the new concession agreement is for a period of 10, rather than 5 years, *Appendix H*, so a failure to acquire a concession would be virtually fatal to a nationally marketed car rental franchise such as Budget's.

The Authority thus demands a "Privilege Fee" on Budget's Local customer and Non-Airport Business despite an admission by the Authority that Budget's Non-Airport Business or Local customers do not impose any burden on the facilities of the Airport or even enter onto its property during the rental transaction. *Appendix D-57 to D-58.* Indeed, the Authority unabashedly asserts, and is so supported by the rationale of the

decision below, that it could charge a concession or privilege fee on ALL of Budget's eight other off-airport locations in the City of Columbus, not just its designated service facility location near the Airport. *Appendix D-39 to D-40.*

Chillingly, the Airport stakes out the position that it can charge virtually whatever it can get away with, which the decision of the trial court below supports. So, under the rationale of the court below, not only the Authority but any government entity across the nation authorized merely to "charge rent or fees" could unilaterally and arbitrarily impose upon any vulnerable user a fee of a portion of its entire national business revenue (if the market would so bear), not merely rental car companies as Budget, but any user such as a Federal Express or a United Parcel Post, a McDonald's, or a Hilton Hotel, and on and on. Without proper application of equal protection limits to the Authority's exercise of discretion, there is literally no stopping what an Authority can get a way with.

The Authority's position, when viewed in the light of the required analysis, is properly seen as a direct, albeit subtle, violation of equal protection rights as to Budget on the specific facts of this case. In addition, but for this Court's review, the decision below would establish not only an unlawful violation of Budget's rights under the subject concession agreement, but just as wrongfully

would permit the establishment of a national system of non-legislative governmental entities with administrator/functionary managers with both the power (and now the right) to exercise unfettered arbitrary, discretionary, extra-territorial jurisdiction for the sole purpose of raising as much revenue as the market will bear, yet avoid even the minimal equal protection rights to which such governmental action is currently subject. Put another way, the decision below exempts acts by a governmental entity exercising delegated discretion which the empowering government itself could never exercise in the first place from equal protection analysis.

Under the decision below, this carnivorous cadré of unregulated functionaries will make these revenue-driven determinations without the requirement that the justification for the fees they impose be grounded in a demonstrable analysis showing a reasonable relationship between those fees and the burden/benefit of the Authorities' facility in providing the access or services in exchange for those fees. It is unequal protection incarnate to permit the decision below to stand because it establishes as acceptable a governmental entity's unilaterally imposition as additional fees upon a governmental facility user of a percentage of income unrelated to the governmental facility without even the minimal constitutional justification so well established

and otherwise required. This unjustified exception to the usual minimal requirement of a governmental rational basis which the decision below permits must be corrected upon review by this Court.

SUMMARY OF THE ARGUMENT

The Authority, a state governmental agency, has, *inter alia*, the power to charge rent or fees for the use or services of the port authority. However, where not a tax, such rent or fees for use or services can not be motivated solely to raise money and can not consist of palpably arbitrary or capricious categories of fee payers. The fees or rent must have some rational relationship to the purported governmental function, the operation of the Airport facility (and not simply raising money), and be demonstrably based upon either the burden placed on the facility by the use or the benefit conferred upon the user. This is a basic requirement of equal protection under both federal and Ohio constitutional law. *Allied Stores of Ohio, Inc.* v. *Bowers, 358 U.S. 522 (1950); United States.* v. *Kokinda*, 497 U.S. 720 (1990); *Fabrey* v. *McDonald Village Police Dep't*, 70 Ohio St.3d 351, 639 N.E.2d 31 (1994); *Sorrell* v. *Thevenir*, 69 Ohio St.3d 415, 633 N.E.2d 504 (1994). The same equal protection standard must be applied under Ohio decisional and constitutional law. *Granzow* v.

Montgomery Cty. Bureau of Support, 54 Ohio St.3d 35, 560 N.E.2d 1307 (1990); *State ex rel. Gordon* v. *Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952); *Cincinnati* v. *Roettinger*, 105 Ohio St. 145, 137 N.E. 6 (1922); *Associations. Conventions, Trade Shows, Inc.* v. *The Ohio Expositions Commission*, 1989 WL 52940 (Ohio App. May 18, 1989) ("ACT I") (attached as *Appendix E*); *Associations, Conventions, Trade Shows, Inc.* v. *Board of Franklin County Commissioners*, 1991 WL 160044 (Ohio App. Aug. 15, 1991) ("ACT II") (attached as *Appendix F*).

The Authority, however, in a subtle derogation of these protections, declares that it has the right to charge whatever the market will bear under the rubric of rent or a "privilege fee," even where there is no actual or even claimed rational basis for imposing such a fee upon a concessionaire's business income unrelated to the Airport facility's use.

Moreover, the decision of the Authority is not entitled to any degree of judicial deference to legislative determinations under the Court's equal protection analysis (assuming a rational basis for the fee's imposition, which there is not), where the legislative process' inherent political safeguards are totally lacking, and there are no elected decision-makers, no legislative hearings nor investigations, no promulgated regulations or even actual legislative enactments.

Here, to the contrary, the Authority's Privilege Fee is for the sole purpose of acquiring greater income. The fee classification is not even a regulation and was not determined or imposed by any legislative body. Instead, the Authority's fee is imposed upon an artificial classification of concessionaires' non-airport revenues without a supported rational relationship between the fee imposed and either the burden to the Authority facility or benefit to Budget from the use of the Airport thereunder. As such, such a determination by an administrator/functionary is entitled to no judicial deference. *Cf. Hampton* v. *Wong*, 426 U.S. 88 (1976).

Finally, it is a patent violation of equal protection for an Authority to assert jurisdiction of and impose a fee upon the non-airport business of an Airport concessionaire where there is no rational relation between the use or services of the Airport facility by the concessionaire and the non-airport business, where there is no demonstrable legislative policy or articulated legitimate state interest (other than raising revenue), and such non-airport business activities occur outside of and are unrelated to the Airport facility.

REASONS FOR GRANTING THE WRIT

I

THE AUTHORITY'S FEE AS IMPOSED UPON BUDGET HAS NO RATIONAL RELATION TO THE BURDEN ON THE AIRPORT OR BENEFIT TO BUDGET IN THE OPERATION OF BUDGET'S AIRPORT CONCESSION, AND IS ILLEGAL IF A TAX, AND IF NOT A TAX, FAILS EVEN MINIMAL EQUAL PROTECTION ANALYSIS.

A

An Additional Concession Fee Artificially Created Which Imposes Upon Only Certain Concessionaires a Privilege Fee For Use of a Governmental Port Authority Airport Facility Which Fee Has No Relation Either to The User's Burden Upon The Facility or the Benefit to the Concessionaire From The Use of The Airport Violates Equal Protection of The Law.

The Equal Protection Clause of the Fourteenth Amendment commands that "[n]o State shall ... deny any person within its jurisdiction the equal protection of the laws." Essentially, this is a direction that all persons similarly situated should be treated alike. The Ohio

Supreme Court has held that Ohio's equal protection limits are almost identical to its federal counterpart, *Sorrell v. Thevenir, supra*. Therefore, the analysis will be the same under both Constitutions.

The Authority is a governmental entity, which actions and regulatory conduct are subject to the restrictions imposed upon state action by the Equal Protection Clause of the Fourteenth Amendment[1] to the United States Constitution. The trial Court stated:

> This Court is of the opinion that Budget's constitutional rights are assertable, both as to equal protection and freedom of speech. [footnote omitted.] Although the Port Authority, like any other property owner, is free to insist upon the terms and conditions it imposes upon persons or entities desiring to have access to or use its property, it cannot impose conditions that are contrary to the rights granted to all citizens under the United States Constitution.

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[1]Ironically, the trial court properly recognized Budget's constitutional rights, but mis-analyzed them as to equal protection, while properly analyzing them in the context of free speech analysis. For example, it stated: "[I]n this Court's view, the Port Authority, even when acting it its proprietary capacity, does not enjoy absolute freedom from the constraints imposed by the Equal Protection Clause of the Fourteenth Amendment." *Capital Leasing v. Columbus Municipal Airport Authority*, 13 F.Supp. 2d at 655.

Capital Leasing v. Columbus Municipal Airport Authority, 13 F.Supp. 2d at 654.

The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary ... . The rule often has been stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." ... [I]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law. *Allied Stores of Ohio v. Bowers*, 358 U.S. at 527. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

B

Whether a Tax, or Rent, The Fee Imposed by The Authority Must Pass Equal Protection Analysis - Avoiding The "T" Word

The Authority has been given broad authority by Chapter 4582 of the Ohio Revised Code to increase, by proper procedure, the property taxes of residents served by the Airport. This is politically very unpopular. The Authority does not claim to have levied a tax upon

Budget.[2] Rather, without any supporting analysis or principled bases, the Authority, through an administrator/functionary, imposed the requirement of a "designated facility" for concessionaires and through this artifice seeks to impose a fee upon the non-airport revenue generated at the designated facility.

In spite of state law requirements so to do, the Authority made no study or analysis of what burden upon the Airport facility the designated facility or its use by Budget would create. Nor has there been any study or analysis of what, if any, benefit to Budget a designated facility would generate in relation to the Airport. Instead, the Authority simply inquired as to what other, similar Authorities were able to get away with in charging a fee to concessionaires.[3]

"An Unfair Tax By Any Other Name"

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[2]Budget believes that the Privilege Fee at issue is an illegal tax levied in a discriminatory fashion upon Budget, in violation of Budget's equal protection rights. The trial court found, however, the Fee as imposed on Budget was not a tax. *Capital Leasing of Ohio, Inc.* v. *Columbus Municipal. Airport Authority*, 13 F.Supp. 2d 640, 652 (1998). Whether a discriminatory tax or a discriminatory usage or rental fee, however, the Fee violates Budget's equal protection rights.

[3]The prospect of a national network of monopolistic, unbridled governmental authorities motivated only to generate more income and engaging in the blatant, collusive practices described by the Authority without the limits of the legislative process or the minimal requirements of equal protection is precisely why the decision below must be reversed.

The government's unfair exercise of this unbridled power is exactly what the constitutional equal protections rights are designed to shield against. Indeed, the decision below falls prey to the facile explanation that this unfair treatment is "purely an economic decision, is not arbitrary and has a rational basis related to a legitimate governmental interest." *Capital Leasing v. Columbus Municipal Airport Authority* 13 F.Supp. 2d at 656. Yet, the decision below failed to include in the analysis that the Authority's mission is not to raise revenues through fees and rents, but to operate the Airport facility. The decision simply defines away the equal protection violation and so misses the point entirely:

> The Port Authority in the present case, unlike *Wayne County,* is not imposing a fee on all of the local income generated at Budget's Designated Service Facility. But ***whether the fee is on all of the local income or on only one half of that income is of no significance, nor is the Port Authority's motive for the imposition of this fee on local income determinative.*** The significant and ***determinative fact is that it is a fee charged by the Port Authority for occupying space and doing business in the terminal.***

Capital Leasing v. Columbus Municipal Airport Authority, 13 F.Supp. 2d at 652 (emphasis added).

Contrary to the decision's language, the motive for and basis of the fee are of paramount significance. If, assuming *arguendo*, the Privilege Fee as imposed upon Budget was not a tax (as the decision below found), then, as a user or rental fee it must rationally relate to the purpose of governmental function, the operation of the Airport facility (*not* revenue generation) to pass Equal Protection Clause analysis. Ohio law[4] clearly requires that the governmental entity such as the Authority conduct an investigation or analysis to determine that the fee required bears a reasonable relation to either the burden upon the facility the use or services create or the benefit derived by the concessionaire from the use of the facility. This is a central fallacy of the decision below, because the Authority conducted no such investigation or analysis to justify the fee on Budget's Non-Airport Business (or even the Authority's Airport Business for that matter) -- the only justification asserted was the Authority's motivation of revenue generation, which the decision below erroneously upheld.

"Hobson's Choice: Take It Or Leave It"

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[4]Indeed, both ACT I and ACT II are decisions of the Franklin County Court of Appeals, directly binding upon the Authority, which is itself entirely in Franklin County.

Further fallacious was the holding below that, as to its equal protection analysis, the court found that the Authority's Privilege Fee was "a fee imposed for the benefit offered to the payer which the payer is free to pay or not pay." *Capital Leasing*, 13 F.Supp. 2d at 652. Of course, the Authority's bidding process was anything but Budget's free will decision. Can a national rental car business really ignore the commercial airport in the fifteenth largest city in America, the largest city in Ohio, indeed the capital city of Ohio? Obviously not.

Ironically, the court below itself made the right analysis, but articulated it only in its discussion of the free speech issues of the opnion:

> This Court does not believe that the Port Authority's position that it has the unfettered right to require Budget to give up its First Amendment rights to obtain space in the terminal on a "take it or leave it" basis is supported by . . . any other authority.

Capital Leasing v. Columbus Municipal Airport Authority, 13 F.Supp. 2d at 659.

A fortiori, the court below erred in failing to apply this exact analysis to the same concession agreement in determining the Fourteenth Amendment issue. Surely the court below was erroneous in believing that the Authority has the unfettered right to require Budget to give up its equal protection rights to obtain space in the

terminal on a "take it or leave it" basis, but not its free speech rights? Clearly, it should not! The error of the decision below as to the Equal Protection rights violation of the Authority's imposed additional fee should be corrected by this Court.

C

The Decision Below Will Create A Monopolistic Network Of Governmental Entities Creating Revenue While Bypassing Established Constitutional Protections.

Airport authorities[5] across the country, through incremental devices such as the "designated facility" at issue here, reach beyond their statutorily defined parameters – customers, vendors and travelers – to impose fees and taxes on people who never set foot on airport property and business which does not arise in or is related to their facility or its use. ***Indeed, It is the opinion of the Authority that it has the power to***

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[5] It is important to note that Columbus' Port Authority, although statutorily created, is operated by an executive director and staff who assert unbridled discretion to obtain revenue from whatever source deemed necessary. The Authority is operated by career bureaucrats who are un-elected and not deserving of the same deference with which this Court has routinely shown towards legislative enactments. Therefore, a more exacting standard of review is required to measure the rationality of the Authority's policies. *See, e.g.,Hampton v. Wong*, 428 U.S. 88 (1976).

exact a fee upon anyone touching upon the Airport facility in an amount based upon any bases whatsoever. *Appendix D-40 to D-43.*

Thus, it is clear that the discriminatory fee imposed upon Budget (distinct from others similarly situated) even though hidden under the sheep's clothing of a "designated facility" mechanism, is merely the first in what will be a series of ever increasing burdens upon unrelated income from concessionaires and other users. Without the minimal shield of equal protection, what will protect against the unbridled imposition of "fees" of "whatever the market will bear" . . . just as the Authority even now claims it has the power to do?

This unbridled government power to impose fees and generate revenue without review by anyone is chilling at best. At its worst, the decision below portends a new era of un-checked government action clothed in the absolute protection of "rent or fees." This Court's review stands as the only and last chance for correction this untenable position, for the state legislatures will surely not step in to correct the unchecked power of these delegated governmental entities from creating revenues at whatever level the market will bear.

Shall we next see the Authority require an Airport hotel to pay a concession fee of a percentage of all the company's business generated in the city, or the state?

Shall we next see the Authority impose a "user fee" for a UPS or FedEx consisting of a percentage of the company's state, national, or even international revenue? Perhaps the Starbuck's concession at the Airport will be required to pay a percentage of its state or national income (because it can be made so to do), while the local coffee shop concession will only be required to pay a percentage of its Airport business. Will the McDonald's franchise restaurant concession at the Airport pay a percentage of its state or perhaps the franchisor's state or national revenue as a concession fee (because it can be made so to do), while another restaurant pays only a percentage of its on-airport business?

Suppose a municipality created a highway port authority with the power to impose rents and fees upon a one mile stretch of highway . . . right in the middle of an important thoroughfare. Would users be charged to cross the facility based upon what the market would bear? Drivers in a hurry or those driving an expensive car could be charged more, while unhurried drivers or those in beat up, used cars would be charged less.

Just as under each of these "far-fetched" hypothetical situations, Budget is forced to pay fees that its local competitors will not be required to pay, or justify to their customers, under the new concession agreement. Budget is not being treated in the same

manner as other concessionaires similarly situated, who do business at, and generate revenue on, the premises of Port Columbus International Airport. Budget, and those similarly situated, is entitled to the equal protection under the law that is denied by the decision below, and which only this Court's review can remedy. What, other than market conditions, prevents the Authority (or any other similar authority in Ohio or anywhere else in the country) from doing whatever it wants, as the decision below permits?

While these examples may seem far-fetched at first blush, there is no practical limit (such as equal protection) on what the Authority has the right and power to do under the decision below. The Authority's power to impose rents or fees is essentially unlimited under the decision below. Only the review and correction of the decision below by this Court can avoid this inevitable outcome.

II

THE DECISION OF THE AUTHORITY TO IMPOSE AN ADDITIONAL FEE UPON BUDGET CONSISTING OF A PERCENTAGE OF ITS NON-AIRPORT BUSINESS IS ENTITLED TO NO LEGISLATIVE DEFERENCE UPON THE COURT"S REVIEW FOR EQUAL PROTECTION VIOLATION.

The Court should not engage in the deference to a legislature's judgment as might otherwise apply in an Equal Protection Clause analysis. *See, e.g., Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 884 (1985). First, the decision here is not a legislative decision, nor a decision by a legislative body. Rather, it is the unilateral decision by an administrative functionary without the required investigation, analysis or justification required under the applicable state law for the imposition of fees, or for Equal Protection Clause compliance. *Associations. Conventions, Trade Shows, Inc. v. The Ohio Expositions Commission, supra, Associations, Conventions, Trade Shows, Inc.* v. *Board of Franklin County Commissioners, supra; Allied Stores of Ohio, Inc., supra.*

Here, there was no deliberative body, only an administrative functionary. Here, there was no elected official, only an appointed administrative functionary. Here, there is no legislative hearing and fact-finding process, no public hearings or testimony on relevant factors, and no review by any authority (if the decision below is sustained). Thus, none of the political and factual justifications for legislative deference exist.

III
AN AUTHORITY, A STATE GOVERNMENTAL ENTITY, MAY NOT EXERCISE EXTRA-TERRITORIAL JURISDICTION AND

UNBRIDLED AND ARBITRARY DISCRETION IN THE ESTABLISHMENT OF DIFFERENT AND ADDITIONAL FEES FOR CONCESSIONAIRES SIMILARLY SITUATED FOR USE OF AUTHORITY PROPERTY WHERE THE FEES SO IMPOSED, CONTRARY TO STATE AND CONSTITUTIONAL LAW, HAVE NO REASONABLE RELATIONSHIP TO EITHER ANY BURDEN ON THE AUTHORITY'S AIRPORT FACILITY OR BENEFIT TO THE CONCESSIONAIRE FROM THE USE OF THE AUTHORITY'S AIRPORT PROPERTY?

While the Authority technically has city-wide jurisdiction under its enabling statute, Ohio Rev.Code § 4582.21 *et seq.*, this does not give it unbridled discretion to act to collect rent outside of the Authority property. So, while the Authority might buy and sell property, advertise, issue bonds and notes, levy property tax, and so on, city-wide, it can only:

> [C]harge, alter and collect rentals or other charges *for the use or services of any port authority facility* and contract in the manner provided by this section with one or more persons, . . . , desiring the *use of services of the facility*, and fix the terms, conditions, rentals, or other charges *for such use or services* . . . Such rentals or other charges shall not be subject to supervision or regulation by any other

> authority, commission board, bureau or agency of the state . . .

Ohio Rev.Code § 4582.31(V) (emphasis added).

Thus, it is clear while the enabling statute purports to gives plenary-type authority to the port authority determine rents and other charges, such power (to the extent a permissible delegation of authority) is limited to charges for the use or services of the port facility (the Airport), not property which the authority does not own, by the plain language of the statute.

Nor, in spite of the statutory language, can a decision by an administrative functionary be entitled to unreviewable and unbridled discretion without running afoul of the equal protection provisions of both the state and federal constitutions.

In *Hampton* v. *Wong*, 426 U.S. 88 (1985), the Court reviewed a Civil Service Commission decision to exclude aliens from competitive federal civil service jobs under claimed plenary power over alienage, and the decision was found to be lacking when exercised by the administrative level:

> The Civil Service Commission, like other administrative agencies, has an obligation to perform its responsibilities with some degree of expertise, and to make known the reasons for its important decisions. There is nothing in the

> record before us, or in matter of which we may properly take judicial notice, to indicate that the Commission actually made any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other. . . .

Hampton v. Wong, supra, 426 U.S. at 115.

Likewise, the Authority here has failed to make or disclose any investigation or analysis to justify the imposition upon Budget of the additional fee of a percentage of Budget's Non-Airport Business as a condition to renting space at the Airport, even though such an investigation and analysis is required under applicable state law and the Equal Protection Clause of the United States Constitution. *Associations. Conventions, Trade Shows, Inc. v. The Ohio Expositions Commission, supra; ACT II, supra; Allied Stores of Ohio, Inc., supra.*

Conclusion

This Court must grant certiorari and reverse the decision below because the decision effectively and permanently precludes review of the arbitrary, extra-territorial decisions of administrative/functionaries in the operation of government facilities. Treating arbitrary, discriminatory and unilaterally imposed fees

as neither taxes nor fiscal penalties subject to judicial review because mere "economic decisions," the court below gave undeserved deference to non-legislative, administrative decisions and precluded Budget receiving effective equal protection under the Ohio and United States Constitutions.

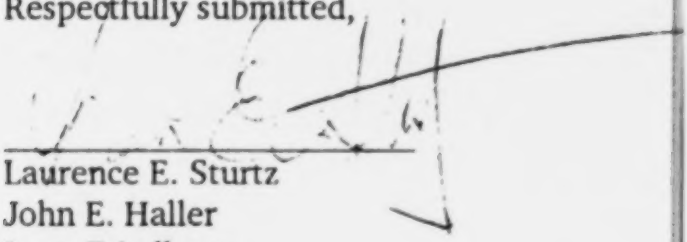
If allowed to stand, the decision below will create a national chain of governmental entities to exercise unfettered discretion without even the minimal judicial protection of the Equal Protection Clause. Nor is such an extrapolation of the decision below at all far fetched, as was discussed by this Court in another context (the discriminatory state scheme to distribute state dividends):

> If the states can make the amount of a cash dividend [a state service under state law] depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence - - or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.

Zobel v. *Williams*, 457 U.S. 55, 65 (1982).

The Court should not permit an administrative entity to unilateral impose fees based exclusively on what the market will bear, without a demonstrable analysis and justification for the fees imposed grounded in a rational relation between the cost of the services or use or the actual benefit of the service or use.

Respectfully submitted,



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NOT RECOMMENDED FOR PUBLICATION
No. 98-3936
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Capital Leasing of Ohio, Inc., d/b/a Budget Rent-A-Car Corp.,

Plaintiff-Appellant,

v.

Columbus Municipal Airport Authority

Defendant-Appellee.

On Appeal From The United States District Court For The Southern District Of Ohio

6th Circuit
Court of Appeals
Filed 06/18/1999
Leonard Green, Clerk

Before KEITH, KENNEDY, and GILMAN, Circuit Judges.

PER CURIAM. Plaintiff Capital Leasing of Ohio, Inc. d/b/a Budget Rent-A-Car of Columbus ("Budget") appeals from the District Court's denial of Budget's request for an injunction against defendant Columbus Municipal Airport Authority ("CMAA") in this action alleging (1) that CMAA exceeded its authority under state law by imposing a fee or a "tax" on car rentals to local, "non- airport" travelers at its location closest to the Airport and (2) that this fee violates the equal protection clause of the United States and Ohio Constitutions.

Having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the District Court erred in denying plaintiff's request for an injunction for the reasons stated in the District Court's opinion of July 15, 1998 at 13 F.Supp.2d 640.

Accordingly, the judgment of the District Court is AFFIRMED.

REPORTED AT 13 F.SUPP.2D 640

Capital Leasing of Ohio,
Inc., d/b/a Budget
Rent-A-Car Corp.,

Plaintiff,

v.

Columbus Municipal
Airport Authority

Defendant.

S.D. Ohio
Eastern Division
Filed 07/15/1998
Kenneth Murphy, Clerk

MEMORANDUM AND ORDER

HOLSCHUH, District Judge.

I. Procedural History

This case originated in the Common Pleas Court of Franklin County, Ohio on March 18, 1998, when plaintiff filed a complaint and a motion for a temporary restraining order and preliminary injunction. On March 18, 1998, a judge of the state court denied plaintiffs motion for a temporary restraining order. On March 31, 1998, plaintiff filed an amended complaint for a temporary restraining order and injunction and for a declaratory judgment. On April 3, 1998, defendant filed

an answer to plaintiffs amended complaint and a notice of removal of this action to this Court based on federal question jurisdiction. On April 20, 1998, plaintiff filed in this Court a new motion for preliminary injunction. On April 23, 24, and 28, 1998, this Court held an evidentiary hearing on plaintiff's motion for preliminary injunction, which hearing, by agreement of the parties, was consolidated with the trial on the merits under Fed.R.Civ.P. 65(a)(2).

Subsequent to the hearing, post-hearing briefs were filed by plaintiff and defendant on May 13, 1998 and May 14, 1998, respectively, and on May 18, 1998, reply briefs were filed by the parties. In a conference with counsel on June 25, 1998, the Court requested that certain documents missing from the record be submitted as a part of the record and that the parties submit supplemental briefs regarding the applicability of *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). The parties were in agreement that this be done, and on June 30, 1998, the additional documents and briefs were filed. The defendant further agreed that the present concession agreement with plaintiff and other car rental companies would be extended to August 1, 1998 in order for the Court to render its decision in this case. The Court, having considered the record and the arguments of the parties, now renders this decision on

the merits of the issues raised by plaintiff's amended complaint and its motion for an injunction.

II. Factual Background

The facts which form the background for the issues raised in this action are essentially not in dispute. The following narration is based partially on a stipulation of facts agreed to by the parties.

Defendant, Columbus Municipal Airport Authority (Port Authority),[1] is a governmental entity created in 1990 by the City of Columbus, pursuant to the laws of Ohio, to manage the operations of the Port Columbus International Airport.[2]

Plaintiff, Capital Leasing of Ohio, Inc., d.b.a Budget Rent-A-Car of Columbus (Budget),[3] a licensee of Budget

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[1] Ohio Rev.Code § 4582.21 et seq.

[2] Prior to 1991, the City of Columbus, owner of the airport property, operated the airport through its Department of Public Utilities and Aviation, Division of Airports. In 1991, the City, pursuant to an Airport Operation and Use Agreement, transferred to the Port Authority the exclusive right and authority to occupy, operate, control, and use the Airport and authorized the Port Authority to possess all of the powers and authority provided or available to a port authority under the provision of Chapter 4582 of the Ohio Revised Code, with certain enumerated exceptions. (Port Authority's exhibit 26.)

[3] Kevin Miles, General Manager of Budget, in referring to Budget stated "We're a franchisee in Columbus, Ohio." (Tr. Vol. II p. 35.) It appears from Budget's invoice that Budget is "An Independent Budget System Licensee" (Budget's exhibit Q.), presumably a licensee of Budget

Rent A Car Corporation, is engaged in the business of renting motor vehicles at various locations in the City of Columbus. It is one of a number of car rental companies that do business either inside the Columbus airport terminal or near the airport terminal. Those companies that are engaged in the business of renting automobiles to travelers using the airport facilities are divided into two general categories, "on-airport" operators and "off-airport" operators.

On-airport operators, including Budget, are car rental companies that have entered into agreements with the Port Authority whereby they obtain space inside the airport terminal for the location of counters and large signs to attract air travelers who desire to rent vehicles before leaving the terminal. In many cases, a reservation for the rental may have been made in advance by the customer or by a travel agent calling a telephone number for a local Budget office or a toll-free number for a national reservation office servicing various Budget Rent A Car locations throughout the United States.

Because the Columbus airport has had no garage for the storage of rental vehicles, it has been necessary for the on-airport operators to store and maintain their vehicles at office locations near the terminal. Customers in the terminal who enter into rental agreements at the

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Rent A Car Corporation. (Affidavit of Robert L. Aprati, General Counsel for Budget Rent A Car Corporation, and Budget's exhibit P.)

terminal counters are then transported by the car rental companies in their shuttle buses to their other facilities in order to obtain the vehicle the customer has rented. Customers can also proceed by shuttle buses directly to the other facility, enter into rental agreements at that office location and obtain their rental vehicles. Although some car rental companies have leased space from the Port Authority for the location of their storage, maintenance and office facilities entirely on airport property, Budget has not done so. For this purpose, Budget primarily uses its office located on private property leased by Budget at 1441 Stelzer Road, Columbus, Ohio, which is adjacent to the airport's property and is a short distance from the terminal. Budget does, however, lease adjoining property from the Port Authority solely for the storage and maintenance of its vehicles. At its Stelzer Road office, Budget rents cars to both travelers who have arrived at the airport and also to non-airport related or "local" customers.

On-airport rental car companies, like other companies engaged in different business inside the terminal, are referred to as concessionaires and have entered into concession agreements with the Port Authority. The car rental concession agreement, whereby a car rental company obtains counter and sign space inside the airport terminal, requires the company to pay for this space a "privilege fee," an amount based

upon the concessionaire's gross revenues. The terms and conditions of the concession agreements are set forth in detail and, until recently, have been for a term of five years. Budget entered into such an agreement in 1987 and in 1993. The current agreement expired April 15, 1998, but, by agreement of the parties, has been extended until August 1, 1998.

Off-airport car rental companies are companies that have no agreements with the Port Authority and have no counter space inside the terminal. They have access, however, to the Port Authority's property for the purpose of transporting customers with their shuttle buses between their off-airport offices and the airport terminal. They are permitted to obtain access to the Port Authority's facilities by the payment of an "access fee" which, together with other detailed terms and conditions, is fixed by regulations adopted by the Port Authority's board.[4]

Some car rental companies in recent years have engaged in the practice of passing on to their customers

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[4] Thrifty Rent-A-Car System, Inc. (Thrifty) is an off-airport car rental company with a location on Stelzer Road. The owner testified that initially off-airport car rental companies were not charged any fee for doing business on airport property, were later charged a fee based upon the number of shuttle bus trips, and are currently charged a fee based on gross revenue from their airport business. The current access fee is 8% of the gross revenue only from its airport customers. (Tr. Vol. II pp. 104-106, 118, and Port Authority's exhibit 17.) Thrifty passes on this cost to its customers as an "access fee" on its invoices. (Tr. Vol. II pp. 119-20.)

the charges imposed on the car rental companies for doing business at airport facilities by carving out or "unbundling" this overhead cost and adding it to the amounts charged on their invoice to the customer for time and mileage, together with charges for other services the customer may desire to purchase, such as insurance, cellular telephones, childrens' seats, and taxes imposed by governmental entities. For example, since December, 1997, Hertz System, Inc. (Hertz), an on-airport operator, adds this charge as "Apt Conc Fee 10%" (meaning Airport Concession Fee) on its invoice to its Columbus airport customers. (Budget's exhibit 0.) The invoice is placed in an envelope (Budget's exhibit N) which contains the "Rental Agreement Terms and Conditions" applicable to "the Hertz Corporation or the independent Hertz System, Inc. licensee identified on the Rental Record." (the Columbus Hertz Rent-A-Car Company is identified on the invoice as a "Hertz System Licensee.") Paragraph 7 of the rental terms and conditions on the envelope concerns "Computation of Charges," and section 7(e) recites that: "Sales/use/excise taxes, tax reimbursement and airport related fees are charged as and where required or permitted by applicable law."[5]

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[5] Hertz does not pass this cost on to all of its customers. Under certain contracts with large volume customers, e.g., IBM, the airport concession fee is not charged. (Tr. Vol. III pp. 17-19.)

Hertz initiated the practice of unbundling its airport concession fee and imposing it on its customers some years ago at the direction of its national licensor, because off-airport companies were doing this and advertising a lower rate. It was discontinued after a very short time because, according to the Hertz witness, "I think it was a combination of one of the competitors that they were trying to compete with changing their policy as well as some negative customer reaction." Hertz, the local licensee, resumed the practice on its own initiative in December 1997. (Tr. Vol. III pp. 24-27.) It did not, however, result in a reduction of the rates charged airport customers but was added income to Hertz which, according to Hertz, enabled it to participate in some of the nationally advertised rates for Hertz rental cars. (Id. at 34-36.)

Budget also has engaged in this practice. In September, 1997, Budget added this expense to the customer's invoice as an "airport fee." (See, e.g., Budget invoice and rental agreement CMH 18741, October 11, 1997 describing the charge as "10% AP Fee," attached to the stipulations of facts, and Port Authority's Exhibit 15, p. 1, describing the charge as "10% Airport Fee.")[6] When

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[6] Prior to September 1997, this concession fee cost was "built into the rate." (Tr. Vol. II p. 20.) According to Budget, it decided to pass this cost on to the customer as a surcharge because the Port Authority was going to increase the cost by including other items, in addition to just time and mileage, as gross revenues on which the concession fee is based. (Id. at

this practice came to the attention of Susan Warner-Dooley, general counsel and director of properties and administration of the Port Authority, she sent a letter on October 9, 1997, notifying the car rental concessionaires that the Port Authority did not consent to the use of the terms "airport fee" as part of any separate statement of the charge on their customers' car rental contracts. (Joint Exhibit 13.) Ms. Warner-Dooley was subsequently contacted by Kevin Miles, General Manager of Budget, who asked whether Budget could use the words "access fee" to describe the separately stated charge. Ms. Warner- Dooley testified that she informed Mr. Miles that "access fee" was not prohibited by her October 9, 1997 letter[7]. (Tr. Vol. III pp. 75-83.)

Since that time, Budget has described this charge on its invoice as "10% Access Fee." (See, e.g., Budget invoice and rental agreements in October, November, and December 1997, attached to stipulation of facts, and Port Authority's exhibit 15, pp. 2-5.) Budget, unlike Hertz, prints the terms and conditions of the rental agreement on the back of the invoice form and not in a

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21-23.)

[7] Ms. Warner-Dooley testified that she informed Mr. Miles that "access fee" was not prohibited; she also testified, however, that she did not authorize use of the terms. (Tr. Vol. III pp. 80-81.) Mr. Miles, on the other hand, testified that Ms. Warner-Dooley told him to call the charge "access fee." (Tr. Vol. II pp. 19, 36-39.)

separate envelope. There is no reference to or description of this added "access fee" in the terms and conditions printed on the back of the invoice form[8]. The "10% Access Fee" appears on Budget's list of charges below its total time and mileage charge--appearing sometimes in the space entitled "Drop Charge"--and just before the "Sub Total" and "Tax and/or Surcharge" spaces. When a customer calls the 1-800 number for the national Budget Rent a Car reservation office and informs that office that the location for renting the car is Columbus, Ohio, the customer is told that there will be a 10% "access fee." If the customer asks about this charge, Budget's General Manager assumes that the customer is told it is "an airport fee" (Tr. Vol. II pp. 15-18) or a "concession fee." (Tr. Vol. II pp. 19, 33.) He did not know what travel agents actually say to customers regarding this surcharge. (Tr. Vol. II p. 81.)

The controversy between Budget and the Port Authority that resulted in this lawsuit arose in the context of major changes being made in the airport's facilities under an expansion and remodeling project and because of the Port Authority's insistence upon significant changes in its concession agreements with on-

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[8] By agreement of the parties, a complete copy of Budget's invoice and terms and conditions as of April, 1998, was submitted post-bearing as Budget's exhibit Q.

airport car rental companies[9]. Included in the construction projects underway at the airport is a new garage adjacent to the terminal which will have spaces for the storage of vehicles of the on-airport car rental companies. When this new garage is completed sometime in the year 2000, it will not be necessary for an arriving or departing air traveler to board a shuttle bus and ride from or to the terminal in order to pick-up a rental car or drop-off a rental car at the rental car company's other facility. That facility, however, would still be used to service the rental car company's local customers, e.g., Budget's Stelzer Road facility.

Since approximately August, 1997, the Port Authority, in advance of the expiration of the current concession agreements in April, 1998, has discussed proposed terms and conditions of a new agreement with car rental companies interested in operating in the terminal as on-airport concessionaires. The proposed agreement included terms, conditions and fees which would be charged for the use of spaces in the new garage when completed. All car rental concessionaires

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[9] There is a lawsuit pending in the Court of Common Pleas of Franklin County, Ohio, number 97CVH04-4335 in which the Port Authority has brought an action against Budget, contending that Budget has not paid its concession fees under its 1987 and 1993 concession agreements. The parties agreed that the federal court is not being asked to resolve any of the issues that are pending in the state court action. (Tr. Vol. I pp. 4-5.)

would rent this garage space, and the other facilities previously used for storage and maintenance of vehicles and renting cars to airport travelers would be used only for maintenance and repair, to store vehicles not in use, and to serve local traffic[10]. The proposed agreement also included provisions which are at the heart of the present controversy.

As originally drafted by the Port Authority, section 4.6 of the agreement prohibited the car rental companies from "unbundling" the amounts paid to the Port Authority and passing this expense on to the customers as a separate charge. (Joint exhibit 3, § 4.6.1.)[11] According to Ms. Warner-Dooley, who drafted

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[10] When the new garage is completed, on-airport concessionaires will complete the rental transaction inside the airport facilities and there no longer will be shuttle buses operated by those companies between the terminal and other locations. (Tr. Vol. I p. 8 .)

[11] Section 4.6.1 of the proposed agreement originally read as follows:

> Concessionaire acknowledges that the payments by Concessionaire to the Authority under this Agreement are for Concessionaire's use of facilities at the Airport, and that none of those payments reflects a fee that is imposed by the Authority upon customers renting cars from Concessionaire. Nothing in this Agreement shall be deemed to permit Concessionaire to charge its customers a separate amount to allow Concessionaire to recover the Privilege Fee, Space Rent or any portion thereof directly from the customer.

(Joint exhibit 3.) (The parties stipulated that fourteen (14) documents identified as "Stipulated Documents" could be admitted into evidence, subject to any objections as to relevance. No objections as to relevance

the agreement for the Port Authority, there were protests by the car rental companies when this was disclosed in the Port Authority's invitation to bid for rental car concessions at the airport[12]. This initial invitation to bid was published January 21, 1998 and required that all bidders sign and return the proposed agreement with their bids. (Joint exhibit 3.) As a result of complaints by Budget and other car rental companies, the Port Authority agreed to three addenda to the proposed agreement.

Addendum Number 1, dated February 9, 1998, deals with the garage under construction and the garage space rent required to be paid to the Port Authority. Some car rental companies, because of this added cost of doing business as on-airport operators, had urged that the Port

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were made, and the parties have referred to these documents as "joint exhibits," and they will be referred to by the Court in the same manner.)

[12] Ms. Warner-Dooley testified that she investigated what other airport authorities were doing with regard to the practice of rental car companies charging their customers a separate amount for the concession fee required by the airport authorities. She considered a report and recommendations of the National Association of Attorneys General Task Force on Car Rental Industry Advertising and Practices (Port Authority's exhibit 18; Tr. Vol. III pp. 64-69) and various articles dealing with practices of rental car companies. (Port Authority's exhibits 19-24; Tr. Vol. III pp. 69-73.) These documents are admitted in evidence solely for the purpose of establishing the fact that Ms. Warner-Dooley conducted an investigation before drafting the prohibition in section 4.6.1 against charging this fee to customers. They are not admitted for the purpose of establishing the truth of the content of the documents in question.

Authority impose this charge as a Customer Facility Charge directly on car rental customers (Tr. Vol. III p. 117), similar to the $3.00 passenger facility charge directly imposed by the Port Authority on travelers purchasing an airline ticket. The Port Authority refused to impose such a charge, but, as a compromise measure, Addendum Number 1 authorized the car rental companies to "unbundle" this expense and add it as a separate charge to their customers as a "garage recoupment surcharge."[13] The terms and conditions under which this charge could be made, including its location on the invoice, are spelled out in the Addendum.[14]

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[13] According to Ms. Warner-Dooley, the operators also desired to have the Port Authority require them to impose this charge directly on their customers because of a concern over potential antitrust liability. An opinion letter from an antitrust attorney, provided by the car rental companies, indicated that there would be no violation so long as the charge was authorized by the Port Authority, although not required or even expressly approved by the Port Authority. (Tr. Vol. III pp. 209-210.)

[14] Addendum No. 1 reads, in part, as follows:

> Paragraph 4.6.1 Add the following first sentence: "Concessionaire understands that the Authority does not support the practice of transferring Concessionaire's obligation for payment of the Privilege Fee due herein to its [ ] customers. However, Authority understands the Space Rent will be a substantial increase over the prior rent for the concessionaires' service facility. Therefore, the Authority does not require but will not prohibit the separate statement of a Garage Recoupment Surcharge on the terms and conditions specified herein."

New Paragraph 4.6.2 Add new paragraph 4.6.2 to read: Garage Recoupment Surcharge Concessionaire is permitted (but not required) to collect a Garage Recoupment Surcharge only under the following conditions:

1. Such surcharge is titled "Garage Recoupment Surcharge";
2. There is no reference to the Airport or the Authority and there is no statement or inference in writing or orally that the fee is imposed by the Airport or the Authority;
3. Such Surcharge shall be immediately adjacent to Concessionaire's time and mileage charge on the customer's invoice;
4. If the Concessionaire elects to charge a Garage Recoupment Surcharge, Concessionaire complies with FTC requirements with respect to this charge and notifies the customer of the surcharge at the time of reservation and again at the time of execution of the contract;
5. The amount of the surcharge per rental car transaction does not exceed the applicable Annual Garage Recoupment as described [in section 4.6.3].

(Joint exhibit 4.)

The Port Authority has interpreted its current concession agreement as imposing a charge on the on-airport car rental companies computed on the basis of a percentage of their gross revenues at both their counters

inside the terminal and at the facilities where they store and maintain their vehicles, referred to in the proposed agreement as "designated service facilities." (Tr. Vol. III p. 60.)[15] The new agreement would specifically describe this method of calculating the "privilege fee,"[16] although the percentage would now be applied to include income not previously included, e.g., insurance charges, cellular phone charges, etc. The percentage, however, is reduced from 10% to 9.25%.[17] Both Budget and Thrifty,[18] car

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[15] The Port Authority's position that Budget has violated its current agreement by not including all of its income from the Stelzer Road office is the subject of the lawsuit brought by the Port Authority against Budget in state court. (Supra, footnote 9.)

[16] Section 4.2.1 of the proposed agreement defines Gross Revenues as follows:

> Gross Revenue means the total amount charged by Concessionaire during an Agreement Year, including any separately stated fees, surcharges and other charges, in connection with: (i.) Concessionaire's Rental Car Business under this Agreement; (ii.) any activities related directly or indirectly to that business; and (iii.) any other business of Concessionaire in the Operating Areas, in Concessionaire's Designated Service Facility, or elsewhere at the Airport.

(Joint exhibit 8.)

[17] Each on-airport car rental company must also agree to pay a minimum annual guarantee. The company pays the Port Authority the greater of the minimum annual guarantee or the 9.25% privilege fee.

[18] In previous years, Thrifty has been an off-airport operator; Thrifty plans to go on-airport under the proposed agreement. (Tr. Vol. II pp. 118-

rental companies whose service facilities are not on airport-owned property but on private property located on Stelzer Road in close proximity to the airport, protested against the inclusion of rental income from these locations that is "local income," i.e., car rentals to customers for local, non-airport related use. (Tr. Vol. II p. 84-85.) Both Budget and Thrifty informed the Port Authority that 40% of the business conducted at their Stelzer Road locations is with local customers. In response, the Port Authority did not change its method of calculating gross income in the proposed contract, but it did, by Addendum Number 2, effectively reduce this percentage fee on the local income from 9.25% to 4.625% by excluding 50% of the gross revenues from local customers.

Addendum Number 2 paragraph 4.2.3.1 (exclusions from Gross Revenue) reads, in part, as follows:

> Add new sub-paragraph 4.2.3.1 to read: "Local Traffic Fifty percent (50%) of the Gross Revenue from each of Concessionaire's transactions with a Local Customer occurring at Concessionaire's Designated Service Facility. For purposes of this Agreement, a Local Customer is a customer residing within the Columbus Metropolitan Statistical Area (MSA) as

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19.)

documented by a driver's license showing an address within the Columbus MSA."

(Joint exhibit 5.)

Finally, Addendum Number 3 reflects a retreat by the Port Authority from its initial desire to prohibit the "unbundling" of the privilege fee and assessing it on the car rental customer as a separate charge. Addendum Number 3 recognizes that such a practice may occur and that, if it does, such a charge must appear adjacent to the time and mileage charges and a number of specific words may not be used to describe this *648 charge. Addendum Number 3 reads, in part, as follows:

> Paragraph 4.6.1 Delete Section 4.6.1. Add new Section 4.6.1 to read: "Concessionaire acknowledges that the payments by Concessionaire to the Authority under this Agreement are for Concessionaire's use of facilities at the Airport, and that none of those payments reflects a fee that is imposed by the Authority upon customers renting cars from Concessionaire. Concessionaire understands that the Authority does not support the practice of transferring Concessionaire's obligation for payment of the Privilege Fee due herein to its customers. Concessionaire is prohibited from using the following words, or any form thereof: Airport, Authority, Government, Port Columbus, Concession, Access, Passage, Cost of Doing Business, Fee, Toll, Assessment, or Tax in

describing any surcharge the Concessionaire may impose on customers. Any charges made by Concessionaire on its customers in an attempt to recover its costs in operating under this Concession Agreement must appear adjacent to time and mileage charges. Concessionaire is prohibited from stating or implying, in writing or verbally, that the Airport or Authority imposes or approves of any such direct charge to a customer. The Authority understands the Garage Space Rent will be a substantial increase over the prior rent for the concessionaires' service facilities. Therefore, the Authority authorizes, but does not require, the separate statement of a Garage Recoupment Surcharge on the terms and conditions specified herein."

(Joint exhibit 6.)

III. Issues

Budget contends that any charge imposed by the Port Authority on revenues at its Stelzer Road location from car rentals to local, non-airport travelers (1) is a tax and beyond the Port Authority's ability to impose, and (2) is a charge not imposed on other businesses that operate in the terminal under concession agreements and hence violates the Equal Protection clauses of the United States and Ohio Constitutions[19]. Budget also contends that the

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[19] Budget also initially challenged a provision of the proposed agreement dealing with the intentional diversion of airport related

restrictions on its speech in describing the privilege fee to its customers on its invoices is a violation of Budget's right to freedom of speech under the First Amendment to the United States Constitution. Budget seeks an injunction against the Port Authority to prevent the enforcement of the challenged provisions.[20]

IV. Discussion

A. Budget's Claim that the Privilege Fee Cannot Be Imposed on Revenue From Local Traffic

As noted earlier, Budget's office on Stelzer Road, adjacent to the airport property, rents *649 vehicles to travelers using the airport facilities and also to local customers who have no connection with the airport. The proposed concession agreement requires that a car

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customers (Joint exhibit 8, § 4.5 No Diversion), but this dispute was resolved by the parties prior to the hearing.

[20] Prior to the hearing, the Court raised the question of its ability to enjoin the collection of the charge on local car rentals if, as Budget contends, it is in reality a tax, in light of the Tax injunction Act, 28 U.S.C. § 1341. Budget agreed to limit the relief sought regarding this issue to a declaratory judgment. (Tr. Vol. I pp. 3-4.) However, the Court notes that, should it find that the privilege fee is a tax, there would still be the question of the Court's ability to provide the declaratory relief sought by Budget. The Tax Injunction Act "applies to declaratory as well as injunctive relief." *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 338, 110 S.Ct. 661, 107 L.Ed.2d 696 (1990); *California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943).

rental company doing business as an on-airport operator designate a facility for car maintenance and storage for all cars used as part of its airport rental car concession, the facility to be known as the concessionaires's Designated Service Facility. (Joint exhibit 8, § 2.2.) It is undisputed that Budget would be required to designate its Stelzer Road location as its Designated Service Facility. The agreement requires that "All Gross Revenues generated at a Designated Service Facility shall constitute Gross Revenues covered by this Agreement." (Id.) The agreement defines "Concessionaire's Rental Car Business" as including "the rental or short-term leasing of cars and related transactions at the Airport (including Concessionaire's Designated Service Facility) ..." (Id. at § 4.2.2) and makes it clear that income from the Designated Service Facility must be included as gross revenue on which the 9.25% privilege fee is calculated. Section 4.2.1 defines gross revenue as follows:

> Gross Revenue means the total amount charged by Concessionaire during an Agreement Year, including any separately stated fees, surcharges and other charges, in connection with: (i.) Concessionaire's Rental Car Business under this Agreement; (ii.) any activities related directly or indirectly to that business; and (iii.) any other business of Concessionaire in the Operating

Areas, in Concessionaire's Designated Service Facility, or elsewhere at the Airport.

(Joint exhibit 8.)

It is therefore clear that Budget would be required to pay the Port Authority's privilege fee not only on its income from airport-related car rentals but also on its income from non-airport related or local car rentals at its Stelzer Road location. As a result of complaints by Budget and Thrifty, Addendum Number 2 included an exclusion to gross revenues for 50% of the gross revenues on local customers. According to Ms. Warner-Dooley, the exclusion of 50% of the gross revenues due to local car rentals "was our compromise to try to assist the Budget, the Thrifty, that were having difficulties with the combined increased costs with parking garage space rent as well. It was also a recognition that [Budget and Thrifty] do local advertising." (Tr. Vol. III p. 142.) The Port Authority did not exclude such local revenues entirely from the privilege fee because, as Ms. Warner-Dooley explained:

A. We look at, we need those revenues in order to--yes, pay our operating expenses for current capital improvements, future capital improvements. That's what these moneys are going to, and we look at that factor, and that was one of the balancing factors in looking at a 50 percent exclusion for local traffic. That's

one reason, even though we decided to do a compromise, we didn't exclude all local traffic. We need those revenues from 50 percent of the local traffic to help pay our various costs.

Q. And you need the revenues from the 50 percent of the local traffic whether that local traffic has any burden or any impact on your airport, isn't that correct?

A. That is a price that is paid, yes, as part of the concession.

Q. Isn't it correct that you charge the 50 percent income on the local traffic whether or not there is any burden on the airport?

A. That is correct.

Q. You're charging that because you, as the administrator, saying that if you want to come on this airport, that's the fee I'm going to assess you rental car companies; is that correct?

A. That is correct and because of the benefit you get as a concessionaire, the exposure to all

the local traffic that's going through our terminal.[21]

1. The Tax Argument

There is no question regarding the power of the Port Authority to impose charges for the use of its facilities. Ohio Rev.Code § 4582.31 includes among enumerated powers granted a port authority the power to "charge, alter, and collect rentals and other charges for the use or services of any port authority facility as provided in section 4582.43 of the Revised Code." Section 4582.43 of the Ohio Revised Code, in turn, provides that:

> A port authority may charge, alter and collect rentals or other charges for the use or services of any port authority facility and contract in the manner provided by this section with one or more persons, one or more governmental agencies, or any combination thereof, desiring the use or services of the facility, and fix the terms, conditions, rentals, or other charges for such use or services.

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[21] According to Ms. Warner-Dooley, the car rental concessionaires, among all the concessions in the airport terminal, produce the highest revenue for the Port Authority. "We are looking to get money in exchange for the benefits" (Tr. Vol. III p. 52) and "we have the duty to get fair market value from our leases. That would include our concession agreements." (Id. at 132.)
(Tr. Vol. III pp. 138-39.)

It is also clear that income generated from such rentals or other charges must be used only for expenses of the port authority. Section 4582.39 specifies that "rents and charges received by the Port Authority shall be used for the general expenses of the Port Authority and to pay interest amortization, and retirement charges on money borrowed."

It is Budget's position that the charge imposed on local car rentals, although described as a privilege fee, is in actuality a tax and beyond the power of the Port Authority to impose, because it is imposed on transactions that are purely local in nature and create no burden on or cost to the Port Authority. To support its position, Budget relies on Ohio law to the effect that a charge imposed by a governmental entity that bears no relationship to the burden on or cost to the governmental entity is a tax. The cases cited by Budget, however, are distinguishable.

In Ass'ns, Conventions, Trade Show, Inc. v. Ohio Expositions Comm'n, 1989 WL 52940 (Ohio App. May 18, 1989) (ACT I), the Ohio Expositions Commission required a decorating company to sign an agreement to pay the Commission a percentage of its gross receipts in order to obtain access to the Exposition Center for the purpose of doing business with an exhibitor who had rented space in the building. Other companies that provided goods and services to the exhibitors were not

required to pay this charge. The Ohio appellate court held that the Commission was a state agency operating the building "for the benefit of the citizens of the entire state and not for a local municipal corporation" (Id. at *5) and thus was acting in a governmental capacity rather than a proprietary capacity. It also held that the required agreement did not involve any property right or right to possession of the premises, but only the right to come into the building to do business, and as such was a permit or license. Because the amount charged greatly exceeded the costs incurred by the governmental entity, it was deemed to be a tax rather than a license fee. The Court also found that there was no rational basis for imposing this charge on decorators and not imposing it on other similarly situated vendors and hence was a denial of equal protection under the Fourteenth Amendment to the United States Constitution. Ass'ns. Conventions, Trade Shows, Inc. v. Bd. of Franklin County Comm'rs, 1991 WL 160044 (Ohio App. Aug. 15, 1991) (ACT II), dealt with the same issue with respect to the Veterans Memorial building. The same appellate court found that in that case a genuine issue of material fact existed regarding whether the amounts charged by the Board constituted a tax.

In contrast to the ACT I and ACT II cases, the charge imposed on Budget is a charge for occupying space inside the airport terminal for a counter and large signs

and the associated benefits of being an on-airport operator. Although, as previously noted, the name given this charge is a "privilege fee," it is similar, if not identical to a space rental charge. It is not simply a permit or license fee to enter the airport property, it is a charge made for the benefits of occupying the Port Authority's property and doing business at that location. The proposed contract sets forth in great detail the rights and responsibilities of both the tenant and the landlord, so to speak, and cannot in any way be considered merely a regulatory license.

Apart from Ohio law, Budget argues that "other states which have considered the same issue as is present here have reached a similar conclusion." (Budget's post-hearing brief, p. 19), citing, City of Kenner v. New Orleans Aviation Bd., 603 So.2d 220 (La App.1992) (Kenner). In Kenner, a state statute dealing specifically with charges imposed on "nontenant, auto rental users of each airport in this state," imposed certain restrictions on those charges, including a requirement that they "must be based on the cost to the airport of the particular facilities or services used by such nontenant, auto rental user." A New Orleans ordinance authorized the New Orleans Aviation Board to impose charges on the nontenant auto rental companies based upon a percentage of their gross business receipts. The Louisiana Court of Appeals found that the ordinance

and a required Permit Agreement conflicted with the state statute in a number of respects, including the above quoted requirement. The Court found it "unnecessary to address whether or not the fee is an illegal tax." Id. at 227. Kenner clearly has little or no application to the facts of the present case. It was based on a conflict between a state statute and a local ordinance dealing only with off-airport rental car companies and did not involve, as does this case, charges made by an airport authority for a concession inside the airport terminal. Like the statute, the ordinance dealt only with car rental companies "who do not have leases or concession contracts with the Board." Id. at 224.

In the present case, the Port Authority clearly has the authority to impose "rentals or other charges ... for the use or services of any port authority facility" (Ohio Rev.Code § 4582.43), and no statutory restrictions are imposed on the amount of those charges or the method of calculating those charges. The Port Authority has determined that the amount of the concession fee will be 9.25% of the gross income of the rental car company occupying space inside the terminal and that the method of calculating the 9.25% will be to include gross income from both the rental car company's airport counter and its designated service facility. The fact that some part of that gross revenue includes a portion attributed to local

car rentals at the designated service facility does not transform what is essentially a charge for rent into an illegal tax. A rental car company must decide whether the space and benefits of being inside the terminal are worth the privilege fee, or rent, fixed by the landlord of the premises, the Port Authority. As Ms. Warner-Dooley testified on cross-examination:

A. It's in no way a tax. It's a privilege fee for under a concession agreement, concession opportunity, that is bid.

Q. And so if you want to come into the airport and have a counter, you could submit yourself to having a fee levied upon you for all the business of the company no matter where you have that business?

A. That is a business decision that bidders make. Thrifty for a long time has stayed off airport because of that.

Q. And you're saying that's correct. That's what Budget has to do. They have to decide if they will pay what you want from all their businesses, whatever you choose to extract, and then make the business decision?

A. They have to decide if they are willing to live with the terms of the concession as proposed and make that business decision.

(Tr. Vol. III pp. 143.)

Budget makes the same argument here as was made in Budget Rent-A-Car Sys., Inc. v. County of Wayne, 742 F.Supp. 947 (E.D.Mich.1990), aff'd, 951 F.2d 348 (6th Cir.1991) (Wayne County). In that case, Wayne County, Michigan required in its contract with the Budget company that "in consideration for an in-terminal concession at the Detroit Metropolitan Airport, plaintiff must pay 9.5% of its gross revenues derived from all operations within three miles of the airport," Id. at 948. The Budget company argued that its local rentals bore no relationship to its airport activities and therefore to include those rentals in its gross revenues constituted an illegal tax. In rejecting that argument, the district court said:

> Plaintiff's argument is without merit; defendant's system of access fees is not the functional equivalent of a tax. Rather than attempt to decipher the purposes for which every individual who rents a car from every interminal rent- a-car concessionaire, defendant has insisted on the provision in question which applies to all gross revenue a rent-a-car company receives within three miles of the Airport.

Id. at 951.

The Port Authority in the present case, unlike Wayne County, is not imposing a fee on all of the local income

generated at Budget's Designated Service Facility. But whether the fee is on all of the local income or on only one half of that income is of no significance, nor is the Port Authority's motive for the imposition of this fee on local income determinative. The significant and determinative fact is that it is a fee charged by the Port Authority for occupying space and doing business in the terminal. The fact that the computation of that fee is based upon not only income from the airport counter but also from the Designated Service Facility which includes a portion of local rentals, does not transform the concession fee into a tax. As in Wayne County, Budget's argument that such a fee constitutes an illegal tax is without merit.

Budget attempts to discredit the Wayne County precedent by arguing that it involved Michigan law rather than Ohio law. It is a distinction without a difference. The decision did not turn on any question of Michigan law as opposed to Ohio law, nor does Budget point out any variations. It turned instead, on the basic difference between an involuntary tax imposed on some activity for the benefit of the public and a fee imposed for some benefit offered to the payer which the payer is free to pay or not pay. As our Sixth Circuit said in U.S. v. River Coal Co., Inc., 748 F.2d 1103, 1106 (6th Cir.1984):

> the test has been variously stated, but the chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer.

Budget also denigrates the Wayne County decision because "the Sixth Circuit's opinion is unpublished and carries with it the restriction found in Rule 24 of the Sixth Circuit Court of Appeals." (Budget's post-hearing brief, p. 19.) Apart from the fact that Budget itself relies on two unpublished state court decisions, ACT I and ACT II, supra, which under Rule 2(G)(1) of the Ohio Supreme Court's Rules for Reporting of Opinions are not considered controlling authorities, under Sixth Circuit Rule 24(c), an unpublished opinion may be cited if the unpublished decision has precedential value in relation to a material issue in a case and if there is no published opinion that would serve as well. There are no other decisions of the Sixth Circuit Court of Appeals, published or unpublished, addressing a similar system of fees assessed by an airport or airport authority, and this Court is bound by the unpublished Sixth Circuit decisions as well as by those that are published.

The first prong of Budget's attack on the privilege fee applicable to revenues from local car rentals as constituting an illegal tax having no merit, the Court turns to the second prong--the argument that imposition of such a charge violates Budget's right to equal

protection under the Fourteenth Amendment to the United States Constitution and Article I of the Ohio Constitution.

2. The Equal Protection Argument

Budget's argument that the Port Authority has violated its right to equal protection under both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I of the Ohio Constitution[22] is based upon its contention that "the Authority cannot give any rational explanation or basis as to why Budget will be required to pay essentially 5% of its non-airport, local revenues as a fee when other concessionaires at the Airport are not charged a similar fee." (Budget's memorandum in support of motion for preliminary injunction, pp. 19-20.) In its post-bearing brief, Budget is somewhat more specific as to an alleged discriminatory classification:

> In this case, the Authority cannot give any rational explanation or basis as to why Budget will be required to pay essentially 5% of its non-airport, local revenues as a fee when other

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[22] Ohio's Equal Protection Clause is co-extensive with the equal protection guarantee in the Fourteenth Amendment to the United States Constitution and is subject to the same analysis. See, Fabrey v. McDonald Village Police Dep't., 70 Ohio St.3d 351, 353, 639 N.E.2d 31 (1994); Sorrell v. Thevenir, 69 Ohio St.3d 415, 422, 633 N.E.2d 504 (1994).

> concessionaires at the Airport, i.e., Enterprise, Payless, UPS, Max & Erma's are not charged a similar fee.

(Budget's post-hearing brief, p. 23.)

One very important and undisputed fact must be recognized at the outset. All car rental companies, like Budget, who desire to have counter space and signs inside the terminal are considered as being in one classification as car rental concessionaires, are treated equally by the Port Authority, and are required to sign the same concession agreement. To the extent the other on-airport car rental concessionaires derive local revenue from their Designated Service Facilities, one half of that revenue would also be included as gross revenue subject to the 9.25% privilege fee. No discrimination among the members of this classification has been alleged or proved.

It appears from Ms. Warner-Dooley's testimony on cross-examination that Anton Air Foods operates a franchise of Max & Erma's (presumably a restaurant), a franchise for Massey's Pizza and a subcontract for Charlie's Steak House in the airport terminal. (Tr. Vol. III p. 145.) The terms and conditions and compensation paid to the Port Authority under any concession agreement with Anton Air Foods are not in the record. United Parcel Service (UPS) is not a concessionaire doing business inside the terminal. It is a courier service

which has access to the terminal property and uses the airport's loading docks. (Tr. Vol. III P. 145.) It is not a party to any concession agreement or contract with the Port Authority, but it pays a $300.00 courier fee[23] that has been fixed by the Executive Director of the Port Authority under guidelines adopted by him pursuant to authority delegated to him by the Port Authority. (Tr. Vol. III pp. 146-47.) The Executive Director also fixes the fees charged the public for using the airport parking lots and the public parking garage pursuant to that same authority. The Port Authority distinguishes between concessionaires, i.e. persons or business entities that desire to occupy space inside the terminal and conduct their business on airport property, from persons or business entities that desire merely to have access to airport property for some purpose. The former are required to enter into a concession agreement; the latter are required to pay a user charge or fee and are subject to rules or regulations adopted by the Port Authority or its designated representative. The Port Authority, according to Ms. Warner-Dooley, is acting in a proprietary capacity in requiring contracts of concessionaires ("... how we set up the business terms, is not because we are a governmental entity. It is because we have an opportunity that people wish to bid

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[23]It is not clear from the record whether this fee is paid on a weekly, monthly, or annual basis.

for." Tr. Vol. III p. 144) and in a governmental capacity in its regulation of traffic in and out of the airport, including the traffic of off-airport car rental agencies ("Our governmental authority comes in with the off-site rules." Tr. Vol. III p. 144.)

The reference to Enterprise and Payless is to two car rental companies that apparently occupy somewhat hybrid positions between on-airport car rental concessionaires and off-airport car rental companies. Enterprise has a location on airport property, not inside the terminal but at the Lane Aviation airplane hanger. Payless similarly has a location on airport property, not inside the terminal but at the Concourse Hotel. (Tr. Vol. III pp. 167-68.) The Port Authority does not require these companies to enter into the concession agreement that is required of Budget and other car rental companies having counters inside the terminal, but instead has entered into separate contracts with these companies "that refer to the off-site rules and set parameters for operating." (Tr. Vol. III p. 167.)[24] These two car rental companies, having "access to the airport hotel customers as well as airport hanger users," pay a

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[24] The Concourse Hotel and Lane Aviation had entered into agreements with Payless and Enterprise for servicing their customers at their respective locations. Because their land leases required the Port Authority's approval for this activity on airport property, the Port Authority entered into separate agreements with Payless and Enterprise as part of the approval process. (Tr. Vol. III pp. 92-93.)

higher percentage fee than the 8% access fee off- airport car rental companies are required to pay because of their special positions and their proximity to the terminal. (Tr. Vol. III pp. 167-69, 192.) Although the contracts with these companies are not in evidence, Ms. Warner-Dooley testified that these companies are not required "to pay on their local business," whereas Budget and other car rental companies having counters inside the terminal are required under the concession agreements to pay a percentage of their gross income from local car rentals. (Tr. Vol. III pp. 170-72.)

Although Budget, in its post-bearing brief, does not include off-airport car rental companies in its list of business entities allegedly receiving favored treatment, the Court notes that their operations are governed by "Rules Regarding Off-Site Parking Operators and Off-Site Car Rental Operators." (Port Authority's exhibit 17.) Under those Rules, any car rental company that "uses the Airport by transporting customers to or from the Airport other than pursuant to a contract with the Authority for such services ... must obtain a license to use the airport" and must pay a "User Fee," based upon a percentage of the Operator's gross revenues[25]. (Port Authority's exhibit 17, pp. 2- 3.) Gross revenues is

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[25] From July 1, 1994 to July 1, 1995, the fee was 5%; from July 1, 1995 to July 1, 1996, the fee was 6%; and from July 1, 1997, the fee has been 8%.

defined as all revenues received, derived or accruing to an Operator from its operations conducted at, on, from, or to the airport. (Port Authority's exhibit 17, pp. 1-2.) This is presumed under the Rules to include all transactions occurring in whole or in part at or allocated to locations of the operator within three miles of the airport. This presumption of airport related transactions can be rebutted, however, (and the income excluded from the fee), by providing one of an enumerated list of documents. (Port Authority's exhibit 17, p. 2.) Thus, off-airport car rental companies-- unlike on-airport car rental companies--can avoid paying a fee on non-airport related transactions.

While Budget refers to Max & Erma's, UPS, Enterprise, and Payless as being "concessionaires at the Airport," it is clear from the record that only Max & Erma's is considered by the Port Authority as a concessionaire by virtue of conducting its business inside the airport terminal. Although, as previously noted, the concession agreement with Max & Erma's is not in evidence, Ms. Warner-Dooley testified that this business, like Budget, pays "a concession fee, a percentage fee." (Tr. Vol. III p. 137) and that "on-airport concessionaires" in exchange for the benefits and privileges of being inside the terminal agree to pay "a percentage." (Tr. Vol. III p. 165.) With respect to Max & Erma's, that fee is apparently a percentage of the company's gross income

from the concessionaire's airport operations. Although Budget's counsel questioned Ms. Warner-Dooley about the ability to include in the concession privilege agreement other Max & Erma's locations off airport property, this was never considered by the Port Authority. (Tr. Vol. III p. 145.) The problem with Budget's comparison of its operations with Max & Erma's, apart from the obvious difference between a restaurant and a car rental operation, is that there is no evidence that the concessionaire that owns and operates the franchise for Max & Erma's restaurant inside the terminal conducts any part of that business outside the terminal, i.e., there is no non-airport related or local income that could be subject to the privilege fee. In fact, the evidence shows that the airport operator of the Max & Erma's restaurant inside the terminal does not have any Max & Erma's franchises off the airport property. (Tr. Vol. III p. 145.)

Unlike the Max & Erma's concession in the terminal, the other businesses which Budget believes are more favorably treated, i.e., UPS, Enterprise, and Payless do engage in business off the airport property and receive income from non-airport related, i.e., local, transactions, as does Budget at its Stelzer Road location. Budget's complaint is that it must pay a privilege fee that includes 50% of its Stelzer Road local transactions whereas these other business entities pay fees that do not include

income from local transactions[26]. While this distinction (particularly with reference to the car rental companies, Enterprise and Payless) may be sufficient to raise an equal protection argument, there is some question of whether any claim of a denial of the constitutional right to equal protection is applicable to the facts of this case, as illustrated by the observation of the district court in Wayne County:

> In the case at bar, there is no legislation involved; the government has not specifically classified the car rental companies for different benefits or burdens under the law. The classification is the result of a contract entered into at arms length and mutually agreed to by both parties. It is questionable, then, whether equal protection applies to this case. Defendant maintains that constitutional analysis in a

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[26] Budget has made no equal protection claim based on the fact that off-airport car rental companies are permitted to describe the charge made to their customers as an "access fee" whereas on-airport car rental companies would be prohibited under the new concession agreement from using that description to describe the charge made to their customers. Although Ms. Warner-Dooley believes that the use of the term "access fee" by off- airport car rental companies is misleading (Tr. Vol. III p. 113), the Port Authority has not taken any action to prohibit its use by those companies. (Id. at 114.) Ms. Warner-Dooley was not aware until the week before the bearing that Thrifty was using that term, and Thrifty, presently an off-airport car rental company, is scheduled to become an on- airport car rental company and subject to the restrictions in the new concession agreement. (Id. at 109-110.) She is not aware, and there is no evidence, of how Payless and Enterprise describe the charges on their invoices. (Id. at 192.)

> contractual context is inappropriate and inapplicable. Accordingly, defendant moves pursuant to Fed.R.Civ.P. 12(b)(1) to dismiss for lack of subject matter jurisdiction. The Court recognizes, however, that defendant was acting pursuant to state law when it entered into the contract in question, and by this official action, created a classification that results in different benefits and burdens. See, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 n. 5, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). Accordingly the Court will test the classification using an equal protection analysis.

Budget Rent-A-Car Sys., Inc. v. County of Wayne, 742 F.Supp. at 949-50.

This Court is of the opinion that Budget's constitutional rights are assertable, both as to equal protection and freedom of speech.[27] Although the Port Authority, like any other property owner, is free to insist upon the terms and conditions it imposes upon persons or entities desiring to have access to or use its property, it cannot impose conditions that are contrary to the rights granted to all citizens under the United States Constitution. In U.S. v. Kokinda, 497 U.S. 720, 725, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990), the Supreme Court said that "[t]he government, even when acting in its proprietary capacity, does not enjoy absolute freedom

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[27] Budget's First Amendment right is discussed infra at pp. 656-669.

from First Amendment constraints, as does a private business ..." Similarly, in this Court's view, the Port Authority, even when acting in its proprietary capacity, does not enjoy absolute freedom from the constraints imposed by the Equal Protection Clause of the Fourteenth Amendment.

The Wayne County court pointed out that the Supreme Court has "provided the following guidance for considering whether an economic regulation violates equal protection guarantees," referring to City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). In that case, the Supreme Court said:

> When a local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

> . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

City of New Orleans v. Dukes, 427 U.S. at 303-04, 96 S.Ct. 2513 (internal citations omitted).

The Port Authority's decision to require on-airport rental car concessionaires to pay a privilege fee on a portion of their non-airport related transactions conducted at their Designated Service Facilities but not requiring other business entities having access to the airport to pay a fee on non-airport related transactions is purely an economic decision, is not arbitrary and has a rational basis related to a legitimate governmental interest. There is a great difference between car rental concessionaires that have a counter space and large signs inside the airport terminal and persons or business entities that do not. The space inside the terminal is limited, and is available to a limited number of businesses that desire to conduct their business inside the terminal. (Tr. Vol. III pp. 161-62.) There is an obvious business advantage of having a car rental business located inside the terminal, not only with

respect to customers and potential customers who travel and desire to rent a vehicle, but also with respect to the exposure to local traffic that goes through the terminal. (Tr. Vol. III p. 139.) The Port Authority makes a determination of what the market value is for the concession in setting its fees (Tr. Vol. III p. 138) and solicits bids for concession agreements incorporating those fees.[28]

Courier services, such as UPS, conduct an entirely different type of business, one that does not occupy any terminal space but simply has access to loading docks for the purpose of delivering and picking up packages. Enterprise and Payless also do not occupy any terminal space, but because they have counter locations in closer proximity to the terminal, they are charged a higher fee than off-airport car rental companies. Off-airport car rental companies have the least advantages among the car rental companies and, accordingly, the fee charged by the Port Authority is less than that charged Budget and other car rental companies.

There could be different methods used by the Port Authority in determining the fees charged for use of or access to its property, but, as the Supreme Court has

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[28] The obvious desirability of conducting business inside the terminal and competition for the most favorable location is illustrated by the fact that first choice as to counter space in the new garage is given to the bidder submitting the highest minimum guaranteed privilege fee. (Joint exhibit 3, p. 10.)

said, the judiciary does not sit as a superlegislature to judge the wisdom of the Port Authority's methods. It is clear to this Court that the fees charged the occupiers or users of the airport property have not been fixed in an arbitrary manner; that there is a rational basis for the different fees charged to the different classifications of occupiers and users of the property; and that there has been no violation of Budget's right to equal protection under the Fourteenth Amendment to the United States Constitution or Article I of the Ohio Constitution.

B. Budget's Claim that the Restrictions on its Speech Violate the First Amendment

1. The Applicability of the First Amendment and Standard of Review

The parties are at the opposite ends of the spectrum cast by the First Amendment's protection of freedom of speech.

Budget contends that the Port Authority's requirement that it agree to a contract that *657 restricts the language that can be used by Budget on its invoices with reference to its privilege fee surcharge is a clear infringement on Budget's constitutional rights

under the First Amendment[29]. Its argument appears to be based on two lines of Supreme Court cases. First, Budget contends that a governmental agency's ability to restrict commercial speech is limited and is governed by Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of NY, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (Central Hudson), which sets forth a four-part analysis to be applied in determining whether a restriction on commercial speech meets constitutional muster:

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[29] Budget does not challenge another provision of the concession agreement that deals with requirements regarding information concerning fees and charges. Section 3.9.5 "Information Regarding Fees and Charges" provides:

> Concessionaire shall not misrepresent to the public its prices or the terms and provisions of its rental agreements or those of its competitors. Concessionaire shall comply with all applicable rules and regulations of the Federal Trade Commission and all other governmental agencies. Concessionaire shall fully inform each customer, prior to the execution of such customer's rental agreement, of all fees and charges applicable to such customer's rental. If the Authority determines, after notice and opportunity for Concessionaire to comment, that any of Concessionaire's business practices are unreasonable, deceptive or unconscionable, Concessionaire shall immediately cease such practices upon receipt of a written order to do so from the Authority. The Authority will give advance notice to Concessionaire that the Authority considers a certain practice to be unlawful or discriminatory and Concessionaire shall have an opportunity to respond to the allegation.

(Joint exhibit 8.)

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343. Budget argues that the words used to describe its surcharge--"Access Fee" (Port Authority's exhibit 15)--are not misleading; that this language "accurately describe[s] the fee which they [Budget] have decided to unbundle;" and that there is no governmental interest that can justify prohibiting Budget from using this language. (Budget's post-hearing brief, pp. 27-28.)

In addition, Budget relies on Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (Umbehr), a recent decision of the Supreme Court dealing with the "unconstitutional conditions" doctrine. This doctrine provides that the government " 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no

entitlement to that benefit." Id. at 674, 116 S.Ct. 2342, quoting, Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Umbehr is the latest in a line of Supreme Court decisions dealing with First Amendment protection in the context of government employees.[30] In Umbehr, the Court extended that protection to independent contractors as well as to employees. Budget's argument is that "if a governmental agency cannot regulate the speech of an at- will contractor and use the exercise of the Right to Free Speech as a grounds for terminating the contractual relationship, the mere existence of a written contract does not give the Authority the ability to regulate the speech of Budget and the car rental concessionaires in how they describe the charges which they pass through to the car rental customer." (Budget's post-hearing brief, p. 32.) Stated another way, the argument could be made that the Port Authority cannot condition the receipt of a benefit--a contract for an airport concession--on a curtailment of the First Amendment's right to freedom of speech.

The Port Authority's position is at the opposite end of the spectrum. It contends that the First Amendment has no application whatsoever in this case because of a

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[30] See also, O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), decided the same day as Umbehr.

purported right of the Port Authority to condition the grant of airport space on a requirement that Budget limit its speech. According to the Port Authority, "[t]he concessionaires can then make the business decision either to accept the limitation upon their speech or to forego the business opportunity of being an on-site concessionaire. That choice is not a constitutional one." (Port Authority's post-hearing brief, p. 34.) The Port Authority's position is illustrated by the following colloquy with the Port Authority's counsel:

> THE COURT: Well, does Budget have any right under the First Amendment to the United States Constitution to describe its product in a manner that is truthful and not misleading?* * * * * * You believe they have no such right? They have no such First Amendment right?
>
> MR. GALL: They have no First Amendment right, there is no First Amendment right implicated by a contract provision such as this which requires them to refrain from making these statements in exchange for or as part of the consideration for something the airport is selling to them. No sir, I don't.
>
> THE COURT: In other words, the Airport Authority has the power to prohibit Max & Erma's from telling its customers that, your hamburger is 100% beef?* * * * * *

MR. GALL: As a component of the consideration of space at the airport, yes.

THE COURT: They give up that right?

MR. GALL: They can be required to give up that right.

THE COURT: Is that your position?

MR. GALL: Yes, sir.

THE COURT: In other words, as a component to having space at the airport, they can be required to give up any First Amendment rights they have to commercial speech that is not misleading. Is that your position?

MR. GALL: They can be made to give up the right that your Honor has described, yes.

(Tr. Vol. I pp. 40-42.) In support of this argument, the Port Authority relies on Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (Rust), in which the Court upheld regulations that prohibited abortion counseling in family-planning programs funded under Title X of the Public Health Service Act, 84 Stat. 1506, as amended, 42 U.S.C. §§ 300 to 300a-6. The Port Authority points to the following language in Rust:
By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching

funds or grant-related income. Potential grant recipients can choose between accepting Title X funds--subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project--or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice.[31] Id. at 199, fn. 5, 111 S.Ct. 1759. The Port Authority argues that the same reasoning applies to the present case by analogy, i.e., Budget can choose between accepting the contract with the language restrictions or declining to seek such a contract.[32]

The Port Authority's second basic contention, "even if the First Amendment were implicated" (Port Authority's post-hearing brief, p. 38), is that the Port Authority has not violated Budget's First Amendment rights, because it has the right to prohibit actually or

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[31] In its supplemental post-hearing brief, the Port Authority also relies on Nat'l Endowment for the Arts v. Finley, --- U.S. ---, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), a June 25, 1998 decision of the Supreme Court which followed Rust in the same context of governmental restrictions of First Amendment rights in a government-subsidized program.

[32] The Port Authority also refers to cases involving a governmental entity acting as a "market-participant" under the Commerce Clause, U.S.C.A. Art. 1, § 8, cl. 3 as well as cases involving the Fourth Amendment, none of which appears to the Court to substantially buttress the Port Authority's argument regarding the First Amendment.

inherently misleading speech entirely and to require that potentially misleading speech be presented in a non-misleading manner. Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 111, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990) (Marshall, J., concurring) (Peel). It contends that Section 4.6.1 of the proposed concession agreement is a constitutional effort to prohibit Budget's use of the term "Access Fee" because it is actually or inherently misleading or, at a minimum, potentially misleading. (Port Authority's post-bearing brief, pp. 42, 46.)

In the Court's view, the present case does not fall neatly into any of the categories of cases relied upon by the parties to support their respective positions. This is not a case involving a government subsidy program in which the government has the right to insist "that public funds be spent for the purposes for which they were authorized," Rust, 500 U.S. at 196, 111 S.Ct. 1759, and, consequently, there is no First Amendment right to speech that is contrary to the purpose of that subsidized program. This Court does not believe that the Port Authority's position that it has the unfettered right to require Budget to give up its First Amendment rights to obtain space in the terminal on a "take it or leave it" basis is supported by Rust or by any other authority.

Also, this is not a case in which a governmental unit is exercising its power to regulate or license, as in

Central Hudson and Peel; nor is it a case involving a governmental unit's relationship with its employees or independent contractors as in Umbehr[33]. Budget's position vis-a-vis the Port Authority is not akin to an employee or independent contractor performing some function on behalf of the governmental unit; it is that of a company seeking to rent space inside the airport terminal for the location of its car rental counter in order to do business with travelers using the terminal facilities. In the view of this Court, the facts of this case come within the ambit of the decisions of the Supreme Court dealing with the right of a governmental unit, the Port Authority in this case, as a proprietor, to manage its own property and its internal operations and the restrictions imposed on that management by the First Amendment. In Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), the Court set forth different standards to be applied with respect to government property and the exercise of free

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[33] Although Budget presently has a contractual relationship with the Port Authority, that relationship ends with the expiration of the present contract or any extensions. With respect to the proposed new contract, Budget, as all rental car companies, stands in the position of being a bidder for a new contractual relationship with the Port Authority. In Umbehr, the Court emphasized the limited nature of its decision and said "[b]ecause Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." Umbehr, 518 U.S. at 686, 116 S.Ct. 2342.

speech on that property. In a traditional public forum or a designated public forum, the government, in order to enforce a content-based exclusion on speech, must show that its restriction is necessary to serve a compelling state interest and that it is narrowly drawn to that end, Id. at 45-46, 103 S.Ct. 948, but with respect to other government property, the standard is not that high.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." U.S. Postal Serv. v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Id. at 131, n. 7, 101 S.Ct. 2676. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Id. at 129-130, 101 S.Ct. 2676, quoting Greer v. Spock, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), in turn quoting Adderley v. Florida, 385 U.S. 39, 47, 87 S.Ct.

242, 17 L.Ed.2d 149 (1966). Id. at 46, 103 S.Ct. 948. More recently, the Court reiterated this basic distinction in U.S. v. Kokinda, 497 U.S. 720, 725-26, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990):

> The Government's ownership of property does not automatically open that property to the public. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'n., 453 U.S. 114, 129, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its] internal operation[s]...." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). That distinction was reflected in the plurality opinion in Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), which upheld a ban on political advertisements in city transit vehicles ...
>
> The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or, as was said in Lehman, "arbitrary, capricious, or invidious." Ibid.

The above principles have been applied by the Supreme Court to an airport terminal operated by a public authority. In Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992) (ISKON), the Port Authority of New York and New Jersey which owned and operated airports in the greater New York area adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. A religious corporation engaging in such activity contended that this restriction violated its freedom of speech under the First Amendment. In determining the standard to be applied when a governmental unit is acting as a proprietor, managing its internal operations, the Court said:

> It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); Kokinda, supra, 497 U.S. at 725, 110 S.Ct. 3115 (citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980)); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 788-89, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). But it is also well settled that the government need not permit all forms of speech on property that it owns and controls. U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns., 453 U.S. 114, 129, 101 S.Ct. 2676, 69

> L.Ed.2d 517 (1981); Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. Kokinda, supra, 497 U.S. at 725, 110 S.Ct. 3115 (plurality opinion) (citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

Id. at 677-78, 112 S.Ct. 2701 (emphasis added). The Court found that airports are not public fora and are not subject to a higher burden of justifying speech restrictions than that of reasonableness.

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness. We reiterate what we stated in Kokinda: The restriction " 'need only be reasonable; it need not be the most reasonable or the

only reasonable limitation.' " 497 U.S. at 730, 110 S.Ct. 3115 (plurality opinion) (quoting Cornelius, supra, 473 U.S. at 808, 105 S.Ct. 3439). We have no doubt that under this standard the prohibition on solicitation passes muster. (emphasis that of the Court) Id. at 683, 112 S.Ct. 2701. In considering the reasonableness of a governmental unit's restrictions on speech in a nonpublic forum, Justice O'Connor said: "the reasonableness of the government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances," quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 809, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Id. at 687, 112 S.Ct. 2701 (concurring opinion).

It is evident that a standard of review based on reasonableness is fact-based and is dependent on all the circumstances surrounding the restriction and the reason for its imposition. This is illustrated by Justice O'Connor's concurring opinion in ISKON in which she found that the Port Authority's ban on solicitation was reasonable but the Port Authority's ban on distribution of written materials was unreasonable. Id. at 685-86, 112 S.Ct. 2701.

In the present case, there are, of course, facts which are distinguishable from the facts in ISKON. Here the Port Authority is restricting Budget's speech, not by a Board regulation as in ISKON, but by its insistence that

Budget agree to the restriction as a part of an agreement to do business inside the airport terminal. ISKON involved restrictions on speech by a member of the public inside the airport terminal; the present case involves restrictions on speech by a concessionaire inside the airport terminal. Also, the Port Authority in the present case does not seek to ban all speech by Budget describing the additional charge to its customers but only to require that Budget's description of that charge be made without the use of certain prohibited words. While there are these and other dissimilarities in the factual patterns in ISKON and in the present case, the basic, fundamental unifying fact is that both cases involve a governmental unit, a Port Authority, which is seeking to impose speech restrictions on persons who are using airport property operated by the Port Authority in a proprietary capacity. In the Court's view, the manner in which the restrictions are imposed, the type of person on whom the restrictions are imposed, and the degree of that restriction, while relevant to the issue of reasonableness, do not serve to remove this case from the governing standard of reasonableness applied in ISKON and related Supreme Court decisions dealing

with restrictions on speech by government entities on government-owned property.[34]

Somewhat surprisingly, the Port Authority contends that "the minimal First Amendment protection" given to persons on airport property by the majority opinion in ISKON (505 U.S. at 695, 112 S.Ct. 2701, Kennedy, J., concurring) does not apply in this case. It is the Port Authority's belief that ISKON is not applicable because, "the public forum doctrine ... is only applicable when noncommercial speech is involved." (Port Authority's supplemental post-hearing brief, p. 2.) To support this contention, the Port Authority points to Justice Kennedy's concurring opinion in which he states that "the government cannot, of course, prohibit speech for the sole reason that it is concerned that the speech may be fraudulent." Id., citing, Schaumburg v. Citizens for a Better Env., 444 U.S. 620, 637, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980).[35] The Port Authority contends that,

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[34] In Asian-American Cab Drivers Welfare Ass'n v. Shoenberger, 1992 WL 330046 (N.D.Ill. Nov.5, 1992), which dealt with an alleged infringement of First Amendment rights by a prohibition of certain commercial speech on airport premises, the court applied the reasonableness standard of ISKON without discussing Central Hudson.

[35] Schaumburg struck down an ordinance that prohibited the solicitation of contributions by charitable organizations that do not use at least 75% of their receipts for charitable purposes. The Court distinguished the speech involved in Schaumburg from purely commercial speech. 444 U.S. at 632, 634, 100 S.Ct. 826. While the city had a

"while [Justice Kennedy's] statement is true as to noncommercial speech, it is not with regard to commercial speech." Justice Kennedy's concurring opinion, however, is based on his belief that an airport is a public forum and therefore subject to the higher standards applicable to non-commercial or "pure" speech in a public forum. The important point is that the outcome in ISKON did not turn on the nature of the speech involved--it can be agreed that the speech was non-commercial or "pure" speech. The outcome turned on the fact that the restriction by the government agency dealt with the government agency's own property and the appropriate standard to be applied in that situation.

The Port Authority also refers to American Future Sys., Inc. v. Pa. State Univ., 752 F.2d 854 (3d Cir.1984), cert. denied, 473 U.S. 911, 105 S.Ct. 3537, 87 L.Ed.2d 660 (1985) (American Future Systems) and Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (Fox), cases involving commercial speech activity in the context of a public university's property, in which the courts applied the commercial speech standard of Central Hudson and not the government-owned property standard most

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legitimate interest in preventing fraud, the Court held that the ban was overbroad in labeling such organizations as "fraudulent" and that the city's interest in preventing fraud could be better served by measures less intrusive than a direct prohibition on solicitation.

recently applied in ISKON. Neither case, however, supports the Port Authority's position that the Central Hudson standard must be applied to speech activity on government-owned property if that speech is deemed to be commercial speech. In American Future Systems, the speech was found to be commercial, and the court described the problem of deciding which line of cases applies, i.e., those dealing with government-owned property or those dealing with commercial speech:

> This conclusion [that the speech was commercial speech], however, forces us to confront an unusual situation: the intersection between government regulation of commercial speech and the regulation of speech on government- owned property. Although the Supreme Court has set up a detailed analytic framework for determining the constitutionality of regulations in each of these situations, it has not, to our knowledge, been faced with the question of what test should be employed when both factors are present. If the two modes of analysis were equally applicable to the facts of this case, we would have to determine whether they yielded different results, and, if so, we would have to choose between them in determining the validity of Penn State's regulation.

American Future Sys., 752 F.2d at 862. The court noted that the property in question, university dormitory

rooms, "do [es] not fit neatly into either the public forum or the non-public form mold," and concluded that "[o]ur best course of action, therefore, is to pursue the mode of analysis developed by the Supreme Court for cases involving commercial speech." Id. at 863.

The Fox decision also involved commercial speech in a state-owned university and, again, in dormitory rooms. The lawsuit was initially brought by a housewares company desiring to have access to dormitory rooms to sell its products and by students who desired to buy those products. On appeal from the district court, "the focus of the case shifted" because the housewares company dropped out as a party. Fox v. Bd. of Trustees of the State Univ. of NY, 841 F.2d 1207, 1208 (2d Cir.1988). As the Court of Appeals said:

> Since the case no longer involves the rights of third persons to gain access to state-owned property to give or receive speech, but rather the free speech rights of students who, as dormitory residents, have an undisputed right of access to their rooms as well as certain privacy rights, the public forum cases thought applicable by the district court are inapposite.

Id. at 1212. The Court of Appeals then proceeded to analyze the case under the Central Hudson four-part analysis.

In the Supreme Court, the state argued that, even if the speech was not commercial speech, the Court should uphold the state's action because the dormitories are not a public forum. The Court did not consider this question: Pursuing such an analysis would require us to resolve both legal and factual issues that the Court of Appeals did not address. Since we find that the Court of Appeals must be reversed on the basis of its own analysis, we decline to go further. Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 473 n. 2, 109 S.Ct. 3028, 106 L.Ed.2d 388.

In short, this Court does not believe that the cases cited by the Port Authority support the proposition that if the speech on a government-owned airport is deemed to be "pure speech," the reasonableness standard of ISKON applies, but if found to be commercial speech, the higher standard of Central Hudson's four-part analysis must be applied. In the view of this Court, the Supreme Court's recognition of the right of a governmental entity, "no less than a private owner of property," to preserve the property under its control for the use to which it is lawfully dedicated, is the polestar for locating the proper test or standard to determine the constitutionality of speech restrictions imposed by the government owner on persons desiring access to the owner's property. Whether the speech in question is deemed to be "pure" or "commercial," while certainly a

relevant factor in assessing all of the circumstances to determine the reasonableness of the restriction, the distinction should not require the imposition of two different standards on the owner of the property. If, as found by the Supreme Court, the reasonableness standard is adequate to protect the First Amendment rights of persons who are engaged in "pure" or non-commercial speech on the airport property, it surely is adequate to protect First Amendment rights of persons who are engaged in commercial speech on the airport property, speech which has been determined to have "a subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), rehearing denied, 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978).

Budget's position is that "ISKON stands for the proposition that speech, at an airport, is protected by the First Amendment of the United States Constitution," but Budget "questions whether this case applies at all to the facts before the Court." (Budget's supplemental post-hearing brief, p. 1.) Budget distinguishes ISKON because it involved a total ban on certain speech at the airport whereas the present case does not involve a total ban on Budget's speech at the airport. That difference, however, simply reflects a variation in the extent of the questioned restriction on speech, and while the scope of

the restriction is an important factor in the application of the reasonableness standard, as discussed infra, it does not serve to prevent the ISKON standard from being applied in this case.

2. Application of ISKON's Standard of Reasonableness to the Facts of this Case

Two important facts are uncontested. First, the "access fee" Budget charges its customers is not a fee imposed by the Port Authority on car rental customers. Second, the proposed Concession Agreement, as previous concession agreements, requires the car rental companies to pay the Port Authority compensation for a counter inside the airport terminal and the benefits attendant with doing business at that location. Although denominated a "privilege fee," the compensation required to be paid, in the Court's view, is the equivalent of rental payments for space inside the terminal.[36] Regardless of nomenclature, however, the "privilege fee" is an integral part of Budget's cost of doing business. Budget, for competitive advantages, has carved out this portion of its overhead costs and is passing it on to its

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[36] Ms. Warner-Dooley referred to the Port Authority in this context as a "landlord" (Tr. Vol. III p. 144), the concession contracts being "similar to leases" (Tr. Vol. III p. 162) or "rental agreements." (Tr. Vol. III p. 163.) Mr. Sturtz, counsel for Budget, also referred to the previous concession agreements as "the old leases." (Tr. Vol. II p. 6.)

customers in the form of an "access fee." (Port Authority's Exhibit 15.)

This practice, employed by some car rental companies, of carving out or "unbundling" this portion of their overhead and adding it to the companies' advertised rates when the customer receives the total charges for the car rental, has not been universally approved.[37] An Illinois statute, for example, requires that all car rental charges, including airport surcharges, must be bundled into the advertised rental charges, a requirement that has withstood constitutional challenge, including a claim of First Amendment violation. Alamo Rent A Car, Inc. v. Ryan, 268 Ill.App.3d 268, 205 Ill.Dec. 738, 643 N.E.2d 1345 (1994). In that case, Alamo claimed that this requirement unconstitutionally regulated Alamo's commercial speech. In applying the first inquiry of the Central Hudson standard,[38] i.e. whether the speech in question is misleading, the Illinois court said:

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[37] See, e.g., the Automobile Rental Concession Agreement between the Kenton County Airport Board, which operates the Cincinnati/Northern Kentucky International Airport, and Freedom River, Inc., d.b.a. Budget Rent a Car, which provides that "Concessionaire shall not list concession fees payable to the Airport as a separate item on its customer's rental contracts or invoices." (Port Authority's exhibit 25, ¶ 1.13E of Agreement.)

[38] The court apparently did not consider applying the ISKON standard of reasonableness.

> Alamo's claim does not make it past the first inquiry. The speech affected by the bundling requirement of subsection (f) is misleading and therefore not protected speech. The advertising does not apprise the public of the actual cost of renting a car. Rather, it misleads the public into thinking that the advertised rate, the base rental rate, is the actual cost of the car rental. However, when the customer comes to the rental counter they are charged a significantly higher rate due to additional charges. The State has an interest in protecting the public from misleading advertising which hampers the public's ability to make an informed decision on the selection of a rental car. Therefore, a prohibition on this misleading advertising i[s] not unconstitutional and Alamo's challenge to subsection (f) on first amendment grounds must fail.Id., 205 Ill.Dec. 738, 643 N.E.2d at 1352.

In the present case, the Port Authority "does not support the practice of transferring Concessionaire's obligation for payment of the Privilege Fee due herein to its customers" (Joint exhibit 8, § 4.6.1), but it is not seeking to prevent that practice.[39] Instead, the contract

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[39] The affidavit of Robert L. Aprati, General Counsel for Budget Rent a Car Corporation (Budget's exhibit P), deals primarily with a non-issue in this case. Mr. Aprati argues in his affidavit against any requirement that the airport concession fee be included in the advertised rate and not separately charged to the customers. While section 4.6.1 of the proposed agreement with Budget originally prohibited the privilege fee from being charged as a separate amount, this is no longer the case. Addendum

requirement prohibiting the use of certain words describing this charge is "to insure that the unbundled fee is not described in a manner that further misleads consumers." (Port Authority's post-hearing memorandum, p. 46.) It is the Port Authority's position that the description used by Budget is actually false because such a description implies that the surcharge is imposed on the car rental transaction by the Port Authority. (Port Authority's post-hearing memorandum, p. 43.)

Number 3 recognizes this practice and restricts how this additional charge can be described. Mr. Aprati's affidavit also contains his opinions regarding the First Amendment and the effect of excerpted quotations from an unnamed person in the Office of the Secretary of the Federal Trade Commission and certain state officials, as well as excerpts from concession agreements in some other airport facilities. His opinions regarding the legality or wisdom of permitting the "unbundling" of concession fees, in addition to being irrelevant, are not the proper subjects of an affidavit. As the Sixth Circuit has said, an "affidavit is no place for ultimate facts and conclusions of law." A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co., 650 F.2d 118, 121 (6th Cir.1981), citing 6 Moore's Federal Practice, Part 2, § 56.21(1) at 56-1316 (Supp.1979). Further, the Court notes, in passing, the following statement of Mr. Aprati:

> "5. That notwithstanding a diligent search, my office has been unable to locate any specific case law concluding that practices similar to the current industry practice of separately stating and charging an airport concession fee are deceptive, misleading or unfair."

Mr. Aprati, who executed the affidavit in Illinois, does not refer to the above decision of the Illinois Court of Appeals in Alamo Rent A Car v. Ryan.

This Court does not believe that the words "access fee" can be found to be actually false or inherently misleading. They do describe--in extremely abbreviated form--the surcharge as a cost of using the airport facilities or having access to those facilities. While this may not be an utterly false or inherently misleading characterization of the surcharge, it clearly is a potentially misleading characterization. It does not in any way identify this surcharge as being a recoupment by Budget of a part of its overhead costs of doing business at the airport and not a charge imposed directly on the airport customer by the Port Authority. It appears in close proximity to the listing of governmental taxes on the car rental agreements, and a customer could well be misled into believing that this additional charge is one imposed by the Port Authority or some other governmental entity.[40]

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[40] When questioned by the Court regarding the Port Authority's effort to prevent customers from believing that the surcharge is imposed on the customer by the Port Authority, Thrifty's owner testified:

> THE COURT: But do you feel that [the Port Authority's effort] would prevent you from telling the customer that this is an amount that Thrifty pays the airport for its concession, and we are passing that on to the consumer?
>
> THE WITNESS: I guess my feeling is that the airport is getting the revenue, and I'm not sure what the--their concern is about having the customer know that we're collecting this revenue on behalf of them. (emphasis added)

There can be no doubt that the Port Authority has a legitimate interest in assuring that travelers and others using the airport facilities are not deceived or misled by car rental companies and other concessionaires that do business with those persons. Budget does not contend otherwise. While it contends that its characterization of the surcharge is not misleading, Budget also argues that the prohibition against the use of the list of words contained in section 4.6.1 would prohibit Budget from using any of these words, even if used in an accurate explanation of the abbreviated description. (Budget's post-hearing brief, pp. 32-33.) With regard to the latter argument, Budget is correct.

Although the proposed agreement would prohibit Budget from using any of the listed words in any description of any surcharge Budget imposes on its customers, Ms. Warner-Dooley, who drafted the proposed agreement, did not intend that the prohibition be that extensive. As she testified:

> What I am trying to say is these words can be used in a description, whether it appears on the front or the back, but I don't want these words used in the actual surcharge itself because it's difficult to make the description without using

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(Tr. Vol. II p. 114.) This, of course, is an illustration of the problem. The surcharge is not collected on behalf of the Port Authority. It is collected on behalf of the car rental company.

> these words, I understand, but giving the special emphasis they will give as part of the short fee surcharge, is what the customer is looking at when they're going through the charges. I want these words, if nothing else, reserved for any description. Let's get something less implicating the airport as to surcharge.

(Tr. Vol. III pp. 198-99.) The problem is that section 4.6.1 is so sweeping in its prohibition that, the drafter's intention notwithstanding, it would, by its express terms, prohibit Budget from using any of the listed words, even if used in an accurate and non-misleading description of the surcharge.

If section 4.6.1 of the proposed agreement had stopped with the restriction that "Concessionaire is prohibited from stating or implying, in writing or verbally, that the Airport or Authority imposes or approves of any such direct charge to a customer," the Court would have no difficulty in finding that the restriction does not infringe on plaintiff's First Amendment rights. The undisputed facts are that the Authority does not impose this charge as a direct charge to a customer (as it does with the $3.00 passenger facility charge imposed on each airline ticket, see, Tr. Vol. III pp. 76, 185-86) and that, while defendant is not currently prohibiting the charge from being made by Budget, it has not approved of this charge being assessed by Budget against a customer. Therefore, defendant

clearly has the right to prevent Budget from stating or implying, in writing or verbally, something that simply is not true. Such a restriction, in short, is clearly a reasonable restriction on Budget's speech, and Budget would have no legitimate basis for complaint. Budget does have, however, a legitimate basis for complaint that section 4.6.1 in its present form is unreasonable due to the sweeping prohibition against using any of the listed words, or any form thereof. Literally enforced, Budget could not describe the surcharge as "Budget's cost of doing business at the airport" which, as an example, would be an accurate and non-misleading description of the surcharge.[41]

The proposed agreement specifically authorizes, with respect to any recoupment of rent paid by Budget for the use of the new garage, a description of Budget's charge to its customer as a "Garage Recoupment Surcharge" under the following conditions:

1. Such surcharge is titled "Garage Recoupment Surcharge";

2. There is no reference to the Airport or the Authority and there is no statement or inference in writing or orally that the fee is imposed by the Airport or the Authority;

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[41] As Budget's general manager appropriately said, "We can't even call it what it is, the cost of doing business." (Tr. Vol. II p. 51.)

> 3. Such surcharge shall be immediately adjacent to Concessionaire's time and mileage charge on the customer's invoice;
>
> 4. If the Concessionaire elects to charge a Garage Recoupment Surcharge, Concessionaire complies with FTC requirements with respect to this charge and notifies the customer of the surcharge at the time of reservation and again at the time of execution of the contract; and
>
> 5. The amount of the surcharge per rental car transaction does not exceed the applicable Annual Garage Recoupment as described [in section 4.6.3].

(Joint Exhibit 8, § 4.6.2.) Budget's amended complaint does not challenge the Port Authority's right to require that this expense--if passed on to the customer--be described by the specific language set forth in the contract and that the surcharge be conditioned upon meeting the enumerated requirements set forth in section 4.6.2 of the contract.[42] Budget makes no claim

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[42] The amended complaint seeks a declaratory judgment and injunctive relief only with respect to sections 4.5, 4.6.1 and 18.1 of the proposed agreement. As noted earlier, Budget's objection regarding section 4.5 No Diversion, was settled by the parties. (Footnote 19, supra.) Section 18.1 gives the Port Authority the right to obtain specific performance of all obligations of the concessionaire which, Budget asserts, gives the Port Authority the "ability to obtain injunctions to regulate the content of the communications between [Budget] and its customers." (Amended Complaint ¶ 29.)

that these restrictions regarding garage rental expenses are any infringement on its First Amendment rights, nor has any argument or evidence been presented that would support a finding that the provisions of 4.6.2 are more extensive than necessary to serve the legitimate governmental interest of preventing car rental customers from being misled as to the true nature of the particular expense of Budget being passed on to its customers in the form of a surcharge.

In the opinion of this Court, the Port Authority could require similar language with respect to Budget's surcharge for the cost of its concession inside the terminal by simply changing the description of "Garage Recoupment Surcharge" to "Concession Recoupment Surcharge."[43] The description would not be misleading or potentially misleading--any more than the garage recoupment surcharge--because it describes, in abbreviated form, a charge for the concession cost paid

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[43] Budget agreed that it could "live" with this description. (Tr. Vol.I. p. 27.) The Port Authority, however, apparently does not want the word "concession" used, although its objection seems to be based more on where the word appears on the invoice than on the word itself. (Tr. Vol. I p. 36-37.)

by Budget that is being recouped from its customers by Budget.[44]

According to Ms. Warner-Dooley, she drafted the prohibition against the use of the listed words, rather than draft a required description, as she did with the "Garage Recoupment Surcharge," because she did not want to extend any alleged antitrust protection to the car rental companies with reference to their privilege fee surcharge. (Tr. Vol. III pp. 211-216.)[45] The Court believes that it is within the power of the Port Authority to require that concessionaires that impose a surcharge on persons using the airport facilities describe that surcharge in language that would prevent airport patrons from being misled regarding the origin and nature of the surcharge. It may do so by specifying the language to be used--as the Port Authority has done with

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[44] The Court does not mean to suggest that this is the most appropriate language that could be used. There are undoubtedly other combinations of words that would describe the surcharge in an accurate and non-misleading manner. The problem with the extremely broad prohibition in its present form is that it unreasonably restricts Budget from the use of words which could, and perhaps should, be used to fairly describe the surcharge.

[45] This Court is concerned only with the First Amendment issues raised by the prohibition; there are no antitrust issues involved in this case, and the Court expresses no opinion as to whether the conduct of the car rental companies does or does not violate any antitrust laws or whether the authorization by the Port Authority to impose such charges does or does not provide some protection against a contention that there is a violation of the antitrust laws.

respect to the Garage Recoupment Surcharge--or it may leave it to the concessionaires to formulate their individual descriptions, which, incidentally, could well result in a variety of descriptions used by different car rental companies. While the former method would be a restriction on commercial speech, so long as the required language would be truthful and not misleading and would further a legitimate interest of the Port Authority, it would be a restriction that would be a reasonable restriction under the ISKON standard and would not violate plaintiff's First Amendment right to freedom of commercial speech. If the Port Authority chooses the latter method--as it has done in the proposed agreement-- it may not restrict the language chosen by the car rental companies to a degree that it prevents the companies from describing the surcharge in a truthful and not misleading manner. By permitting the car rental companies to devise their own descriptions but imposing excessively broad prohibitions on the words that can be used, the Port Authority has infringed upon Budget's right to freedom of commercial speech.

Although Budget does not complain about the requirement that the Garage Recoupment Surcharge be "immediately adjacent to Concessionaire's time and mileage charge on the customer's invoice" (Joint exhibit 8, § 4.6.2), it does complain about the requirement that any surcharge based on its concession charge "must

appear adjacent to time and mileage charges." (Joint exhibit 8, § 4.6.1.) The Court finds no merit in this complaint.

Budget contends that this requirement could cause customer confusion because car rental customers are accustomed to seeing such charges at the bottom of the invoice and not at the top next to the time and mileage charge. Budget's General Manager testified:

> So if the customer was to question us and say, what is this? Why is this up here? Because they are conditioned to know sales tax is always on the bottom. They know what sales tax is. Airport fees have always been on the bottom. People know what that is.

(Tr. Vol. II pp. 47-48.) Thrifty's owner testified:

> QUESTION: Where is it traditionally shown, an airport surcharge, on the contracts that the customer is used to seeing?
>
> ANSWER: Down where the tax is at the bottom of the contract, subtotals and then charges, sales tax and airport access fees.

(Tr. Vol. II pp. 108-09.) It is precisely because of its proximity to governmental taxes that the Port Authority wants the surcharge relocated on the invoice to lessen the potential of confusion of this charge made by Budget

with charges made by governmental units, including the Port Authority.

The requirement, in short, is a reasonable effort by the Port Authority to prevent the car rental customer from assuming that the surcharge, presently appearing in close proximity to governmental taxes, is, like those taxes, an additional charge being imposed directly on the customer by the Port Authority or some other governmental agency.[46]

Budget has expressed concern that the language the Port Authority proposes to prohibit in describing the surcharge conflicts with the language used by Budget's licensor in its national advertising. (Tr. Vol.1, pp. 20-24.) In the Court's view, the Port Authority's right to require that the surcharge be stated in a manner that is not misleading or potentially misleading is not affected by the manner in which the licensor describes the surcharge in its national advertising.

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[46] The Court is aware that Budget's current form for computer generated invoices has limited space for a description of its charges. Cryptic abbreviations, even if accompanied by a fine print explanation elsewhere on the form, may not fairly inform the customer of the surcharge in question in a way that it is accurate and not misleading. The forms may have to be revised to more fully set forth the nature of the surcharge, but if, as Budget says, "Budget would like to accurately and completely disclose to its customers the charges, fees, and taxes associated with renting one of their vehicles" (Budget's memorandum in support of motion for preliminary injunction, pp. 29-30), Budget should be willing, if not anxious, to revise its forms.

3. Application of Central Hudson's Four-Part Standard to the Facts of this Case

This case presents, as the Third Circuit described its case in American Future Sys., Inc. v. Pa. State Univ., 752 F.2d 854, 858 (3d Cir.1984), "an unusual situation: the intersection between government regulation of commercial speech and the regulation of speech on government- owned property." For the reasons previously stated, it is this Court's opinion that the proper standard to be applied in such situations is the reasonableness standard applied to the government-owned airport property in ISKON. The parties to this case, however, have presented their arguments in support of their respective positions in the context of the Supreme Court's decision in Central Hudson.

Budget contends that the Port Authority's restrictions fail to meet the Central Hudson criteria for constitutional restrictions on commercial speech, primarily because the term "access fee" is not misleading and there is no legitimate public interest in preventing Budget from using the prohibited words in an accurate and non-misleading manner. (Budget memorandum in support of motion for preliminary injunction, pp. 30-31.) The Port Authority contends that the term "access fee" is inherently misleading and entitled to no First Amendment protection, but if only potentially

misleading, Central Hudson must be applied. The Port Authority insists that the restrictions meet all the criteria under the Central Hudson standard. (Port Authority's pre-hearing memorandum, pp. 26-31.)

In the Court's view, even if the First Amendment standard applicable in this case is the Central Hudson standard, rather than the ISKON standard, the result would be the same.

In Central Hudson, as noted earlier, the Supreme Court set forth a four step analysis to be made when considering restrictions on commercial speech:

> 1. The speech must concern lawful activity and not be misleading, and
>
> 2. The asserted governmental interest must be substantial.

If the answer to these two inquiries is positive, then it must be shown that:

> 1. The restrictions directly advance the governmental interest asserted, and
>
> 2. The restrictions are not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. 2343.

Budget's speech obviously concerns lawful activity, and as previously stated, the Court does not believe that

the words "access fee" can be found to be false or inherently misleading and not entitled to First Amendment protection. This description of Budget's surcharge, however, is potentially misleading for the reasons previously given. The Supreme Court has indicated that, in cases subject to the Central Hudson criteria, the government cannot place an absolute prohibition on speech that is only potentially misleading if the information can be presented in a way that is not deceptive, i.e., by restrictions that are no broader than reasonably necessary to prevent the deception, In re R.M.J., 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). The Port Authority is not placing an absolute prohibition on Budget describing its surcharge on its invoices. Instead, the Port Authority is imposing restrictions on how Budget's description of its surcharge can be made in a way that is not potentially misleading. The Port Authority's asserted governmental interest--the prevention of misleading or potentially misleading information being given by the airport concessionaires to persons using the Port Authority's terminal--is a substantial governmental interest, and the restrictions are intended to directly advance that interest. The problem is that the prohibition against the use of words which could be used to present the information about the surcharge in an accurate and non-misleading manner are broader than necessary to prevent the description

from being potentially misleading, In Re R.M.J., or in the words of Central Hudson, more extensive than is necessary to serve the asserted governmental interest.

Accordingly, whether the restrictions are reviewed under the ISKONstandard or the Central Hudson standard, the outcome is the same--the restrictions imposed on Budget's speech by section 4.6.1 of the proposed agreement in its present form violate Budget's right to commercial speech under the First Amendment to the United States Constitution.

This Court concludes that Budget cannot be required to relinquish its First Amendment right to commercial speech as a condition of obtaining the Concession Agreement for 1998-2008; that the Port Authority, however, may impose reasonable restrictions on that right as the proprietor of government property used by Budget; but that the restrictions in their present form contained in section 4.6.1 are excessively broad and unreasonable and are, therefore, violative of Budget's First Amendment right and are, consequently, unenforceable.

V. Conclusion

Plaintiff's motion to enjoin defendant from including in plaintiff's gross revenue any income from non-airport related car rentals at its Stelzer Road location, as

required by the proposed 1998-2008 Concession Agreement, is DENIED.

Plaintiff's motion to enjoin defendant from the enforcement of section 4.6.1 of the proposed 1998-2008 Concession Agreement, insofar as that section in its present form prevents plaintiff from using any of the specified prohibited words or any form thereof, i.e., airport, authority, government, Port Columbus, concession, access, passage, cost of doing business, fee, toll, assessment, or tax, to describe plaintiff's surcharge to its customers for its cost of the privilege fee required to be paid by plaintiff to the defendant under the Concession Agreement, is GRANTED. As long as section 4.6.1 remains in its present form as an acknowledgment that plaintiff may formulate its own description of the concession fee surcharge, defendant cannot prohibit the use of words which could be incorporated in a description of the surcharge in a truthful and non-misleading manner. The defendant is not enjoined from restricting the use of the words "access fee" or other potentially misleading words standing alone on the front of plaintiff's invoice, but is enjoined from prohibiting the use of these words or the other listed words in descriptions of the concession fee surcharge that are truthful and not potentially misleading.

Insofar as plaintiff's motion seeks to enjoin defendant from imposing any restriction on the language used by

plaintiff to describe this surcharge, the motion is DENIED. Defendant has the right to require that plaintiff truthfully inform plaintiff's customers, on whom plaintiff imposes the surcharge, that it is a surcharge imposed by Budget and not by defendant or any other governmental entity, and defendant may require plaintiff to so inform its customers both verbally and on plaintiff's invoices and rental agreements in any reasonable manner, including, but not limited to, requiring that the surcharge be described in language mandated by the defendant that is both truthful and formulated to prevent any description of the surcharge from being potentially misleading.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
Case No. C2-98-356

Capital Leasing of Ohio, Inc., d/b/a Budget Rent-A-Car Corp.,

Plaintiff,

v.

Columbus Municipal Airport Authority

Defendant.

S.D. Ohio
Eastern Division
Filed 07/15/1998
Kenneth Murphy, Clerk

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[ ] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order of July 15, 1998, the Motion for Preliminary Injunction is DENIED in part and GRANTED in part. Plaintiff's motion to enjoin defendant from including in plaintiff's gross revenue any income from non-airport related car rentals at its Stelzer Road location, as required by the proposed 1998-2008 Concession Agreement, is DENIED. Plaintiff's motion to enjoin defendant from the enforcement of section 4.6.1 of the proposed 1998-2008 Concession Agreement, insofar as that section in its present form prevents plaintiff from using any of the specified prohibited words or any form thereof, *i.e.*, airport, authority, government, Port Columbus, concession, access, passage, cost of doing business, fee, toll, assessment, or tax, to describe plaintiff's surcharge to its customers for its cost of the privilege fee required to be paid by plaintiff to its customers for its cost of hte privilege fee required to be paid by plaintiff to the defendant under the Concession Agreement, is GRANTED. Insofar as plaintiff's motion seeks to enjoin defendant from imposing any restriction on the language used by plaintiff to describe this surcharge, the mtion is DENIED. The aforementioned ruling hereby terminates this action.

Dated: July 15, 1998

Kenneth Murphy, Clerk

/s/ Peggy Lambert
By Peggy Lambert/
Deputy Clerk

CITED PORTIONS OF TRANSCRIPT
FROM THE HEARING IN THE CASE OF:

Capital Leasing of Ohio,
Inc., d/b/a Budget
Rent-A-Car Corp.,

Plaintiff,

v.
Columbus Municipal
Airport Authority

Defendant.

TESTIMONY TAKEN ON 04/23/1999,
04/24/1999 AND 04/28/1999

Authority.
THE COURT: Thank you, Mr. Gall.
This case is set for hearing this morning on the motion of the plaintiff for a preliminary injunction. As a result of a conference with counsel prior to the commencement of the hearing, the parties have agreed and jointly requested that the case be advanced on the merits and consolidated with the hearing on the motion for a preliminary injunction; and the Court will enter an order accordingly for the record.
It was further agreed that with respect to issues involving the revenue of the plaintiff attributed to so-called "non-airport revenue" at the plaintiff's Stelzer Road address, that this subject would be included in the request for a declaratory judgement, but that there would be no request for injunctive relief regarding that issue if

the Court should find, as the plaintiff contends, that the
privilege fee imposed on the "non-airport revenue" at the
Stelzer Road address is in fact and in law a tax.
Have I stated that correctly, counsel?
MR. STURTZ: Yes, sir.
THE COURT: Mr. Gall?
MR. GALL: I believe so, Your Honor.
THE COURT: Do you want to think about that, Mr. Gall?

MR. GALL: No. I thought Your Honor was going to paraphrase what Mr. Sturtz had said, but you added some stuff in there. I believe we agree and concede that Your Honor has the authority, and we ask the Court to determine whether -- what the Authority proposes to do here is a tax or not; and that no decision as to whether this is a tax or not implicates the provisions of the anti-injunction statute as far as we are concerned.

THE COURT: But if the Court should find that it is a tax, then the question arises then as to whether injunctive relief could be granted under the Tax Injunction Act.

MR. STURTZ: Your Honor, we will not even be requesting that you address that issue. We have remedies in state court if we needed it, but I don't think we will need any remedy. We are just asking for declaratory judgement this morning.

THE COURT: Insofar as the revenue is concerned --
MR. STURTZ: The revenue only, yes, sir.
THE COURT: All right. And finally for the record I think it was understood and agreed in the conference part of the hearing that the Court is not being asked in the context of this case in the federal court to determine any of the issues that are presently pending in an action brought in the Court of Common Pleas of Franklin County,

contrary in the airport's brief, that Budget has paid on airport business for the last ten years and that we're not contesting the airport's right to impose a fee on our client for airport-related business; that is somebody coming off a plane, getting in a car, that's airport business. We do not dispute that whatsoever. We are disputing the ability of the airport to assess a tax, as we refer to it, on non-airport business.

By way of an example, if someone calls -- We have a contract with Borden. Borden wants a car. It would be more convenient to pick it up at Stelzer Road rather than downtown or Mill Run. We have eight other locations. That is not airport business. They pick up the car and drive off to Cleveland. We say there is no burden on the airport and is unrelated, non-airport business.

The record should be clear also that we are

located off of the airport, that is our rental car business
operation. So there is not confusion, there is a very small bit of land that we rent from the airport that is a
land-locked piece of land that we use for a parking lot,
and nobody is contending that makes us an airport facility.
We are not located on the airport for all intents and purposes for its location.
THE COURT: You are referring to the plaintiff's location on Stelzer Road?

decisions in briefs and oral arguments is disfavored by the circuit.

THE COURT: The citation may be disfavored by the circuit; but if it deals with an issue that is directly before the district court, isn't the district court required, Mr. Sturtz, to give full weight to that decision?

MR. STURTZ: Your Honor, I would suggest not; but let me suggest that you don't have to address that issue --

THE COURT: All right.

MR. STURTZ: -- because this is not a federal court issue. This is a state court case. This was filed in the state court, and the law that applies to the jurisdiction of the airport and the ability to impose a tax on the airport is a matter of state law; and there are two specific state law court of appeals decisions out of Franklin County dealing with the exact case we have here, both of them finding that the imposition of a tax on unrelated income, unrelated business, is a tax and violative of the state and federal Constitutions.

And it is my suggestion that your obligation, if I may, with all due respect, as the state court trier of fact's obligation would have been had this not been removed, is we must follow the law of the state on state law issues.

THE COURT: But you have alleged in your complaint

that the imposition of this privilege fee is in fact a tax,
and that it is not applied equally, and it is violative of the equal protection clause of the Fourteenth Amendment of
the United States Constitution.
MR. STURTZ: That is one of the issues, Your Honor, yes, sir.
THE COURT: Wouldn't that question be a matter for federal law, Mr. Sturtz?
MR. STURTZ: We have also alleged it violates the Ohio Constitution; and what I am suggesting, Your Honor, is
on matters of substantive law, which this is, the federal
courts are to apply the law of the state, and the state has
dealt with these facts specifically and ruled that this is
a tax when there is a fee based upon activities unrelated
to the burden of the original activity, it becomes a tax
and is unenforceable in Ohio.
And I'm suggesting that is precedent that this

Court should be following and not a sister district court in an unpublished opinion.

THE COURT: So your position would be that the Court could find that it does not violate the equal protection clause of the United States Constitution but violates the equal protection clause of the Ohio Constitution?

MR. STURTZ: Absolutely, sir. Yes, it can.

THE WITNESS: That's correct.
BY MR. STURTZ:
Q. And if you pass it on, that fee on, and call it a garage recoupment fee, that would be accurate, wouldn't it?
A. That's okay for us.
Q. But right now there is no garage recoupment fee, is there?
A. No, sir.
Q. If you call this fee for access, a privilege of doing business at the airport, a garage recoupment fee, would that be misleading the public?
A. It might mislead, yes.
THE COURT: Well, Mr. Sturtz, so I don't have any misunderstanding, the garage recoupment surcharge that the new contract authorizes you to make, that is for money that you will pay the authority for your spaces and related facilities in the garage?
THE WITNESS: That's for the construction of the

19 garage. Not all the charges that they're charging us, but
20 that is for the building of it, yes.
21 MR. STURTZ: They are separate charges.
22 THE COURT: They are separate charges. You don't
23 pay that until the garage is built in 2000, the year 2000?
24 THE WITNESS: That's correct.
25 THE COURT: Completed in the year 2000?

1 for another location and we prep at that location, at the
2 airport location, and we get paid by the manufacturer. Do
3 they want a percentage of that?
4 Q. Did you measure that as something they wanted when you
5 calculated that 10.5 percent?
6 A. No.
7 Q. You must not understand that they want that, right?
8 A. That's what I am saying. They want so much from us
9 that it has nothing to do even with airport business. If I
10 fix a car for another location and we have charged them at
11 that location to fix it, they want a percentage of that.
12 And those people haven't even come out to our airport. They
13 might not have even rented from the airport at all. We're
14 in Cincinnati, right at their location, and they have a
15 mechanical problem. We fix it. We have to pay the

16 airport. They want a piece of it.
17 Q. Mr. Miles, when the new provisions of the contract came
18 out, you did, I believe you said, an economic analysis of
19 the impact of this on Budget, didn't you?
20 A. On the time and mileage, the LDW, that extra stuff, yes
21 we did.
22 Q. You submitted a bid and signed your name to it based on
23 the existing language in the agreement, did you not?
24 A. Yes, we did.
25 Q. I presume that you have calculated in there the

A. I can't answer that because I have not been there that long.
Q. How long have you been there?
A. Since July 1.
Q. Of?
A. Last year.
Q. Of '97?
A. Uh-huh.
THE COURT: You have to answer --
THE WITNESS: I am sorry.
THE COURT: Your answer was yes?
THE WITNESS: Yes, sir, it was.
MR. GALL: I have nothing further, Your Honor. Thank you, Mr. Miles.
THE COURT: Thank you, Mr. Gall. Redirect Mr. Sturtz?
MR. STURTZ: Just a few quick questions.
THE COURT: Very well.
- - -
REDIRECT EXAMINATION
BY MR. STURTZ:
Q. Mr. Miles, Exhibit 16, the photographs of your airport

23 on-site facility, for the opportunity to have that counter
24 at the airport, what do you pay the airport? What goes
25 through this terminal? What do you pay the airport?

A. I can't give the exact. About a half million dollars.
Q. And it is -- They're being paid for everybody that gets
a car at that location?
A. Anybody that comes into the airport that rents.
Q. Now you tendered a contract to the airport facility, is
that not correct?
A. That's correct.
Q. At the time that was being tendered, did you or did
your company file a suit for a restraining order to prohibit
the opening of those contracts that you tendered?
A. Yes, sir.
Q. And that's this suit right now?
A. That's correct.
MR. STURTZ: I want to point out, there is no
waiver, Your Honor. This was filed ahead of time before the
tender. We tried to enjoin it so that we would not have
acceded to the contract voluntarily. We are protesting.
That's my point, Your Honor.

THE COURT: Mr. Gall?
MR. GALL: I don't believe I argued that this is a waiver. That is not our position.
THE COURT: The Court, frankly, counsel, did have a question pleaded --
MR. GALL: In that case we took it as a waiver, Your Honor.

you went about coming up with this language? How you came up with this language?

A. I came up with this language in part, again in September of 1997 I became aware that some of our rental car concessionaires had started putting on their customer bills a separate charge that might say, airport tax, concession fees, a separate ten percent charge, and this was down with the other taxes; and I was concerned about the implication that it was pointing back saying that the airport was imposing a tax on their -- on the customer's transaction.

I then started, we started calling other airports to find out what was going on at other airports. We found this was something that had developed at airports across the country just within the last half of 1997.

I had several discussions with the rental car

operators about this practice in our meetings as well as on an individual basis. The rental car operators had cited me to the National Association --

MR. STURTZ: Objection, Your Honor, hearsay.

THE WITNESS: -- which is the document that I relied on.

THE COURT: You said somebody referred you to --

THE WITNESS: Right, the rental car operators in part of our discussion referred to a National Association

Q. The requirement for a signed contract, is that Roman numeral 2 there on page 1?
A. Yes.
Q. And back on page 7, at item no. 48, is that the change to which you referred regarding the garage recoupment surcharge?
A. Yes.
Q. Just very briefly, would you tell the Court what this change was designed to accomplish?
A. Yes. As I have indicated, there was a lot of pressure from the operators to -- for the Authority to adopt a customer facility charge, which is the rental car's version of a passenger facility charge. They wanted the Authority to charge a per transaction fee on the rental car customers that could be used to pay the garage rent, the cost of building the rental car facilities in the parking garage.
We, the Authority, was not inclined to adopt that

fee ourselves. We talked with the rental car operators about, well, just include it in your time and mileage charges. They continued to argue they could not increase their charges. They don't set their charges. Their competitor does. Because this was a significant charge, we had estimated at approximately three percent of their current

gross revenues, we crafted a garage recoupment surcharge that would allow them to recoup only the space rent that they were paying to the airport, and we would, the Authority would, get involved to the extent that we would calculate each year the maximum that could be charged as a garage recoupment surcharge. It would take the total amount of rent that was being paid to the Authority for parking garage facilities, divide that by the number of transactions that occurred the prior year. So we would get a maximum per transaction charge, and then the rental car concessionaire could charge that.

We also, though, didn't want -- We put a reduction feature in the garage recoupment surcharge to the extent that in the future their revenues grow because they are in

15 the garage -- Their space rent is a fixed rent. But if
16 they get more business, just because people like the garage
17 operations, which is what we were predicting, we didn't
18 want them to be pocketing that extra profit they would be
19 getting if we just used the same per transaction cost. So
20 we actually reduced it by the increase in gross revenues.
21 As you see, I didn't have my formulas quite correct, and in
22 a later, another addendum, I fixed that; but that's the
23 concept we are trying to do here.
24 So this was a permitted but not required garage
25 recoupment fee. We were not opposing it, but we would not

A. Right.
Q. The front -- Let me ask you the question again. The front property with the -- everything to the top part of the page of that .772 acreage is land not owned by the Airport Authority, is that correct?
A. That is correct.
Q. And is land upon which Budget Rent A Car has operated its rent-a-car business for many, many years?
A. That would be my understanding.
Q. Okay. So under the old contract it is referred to as an off-site location, off-airport location?
A. Under what contract?
Q. Under the existing contract which is now expiring?
A. The concession?
Q. Yes.
A. No. Where the location of the service facility is is irrelevant, whether you are on airport or off airport.

It's where -- You're on airport because you have a counter pursuant to the concession agreement in our terminal.

Q. Well, okay. We are -- I don't want to spend time on that at this point.

A. But that is standard airport industry terminology.

Q. That's fine. You told us that the statutory obligation was to balance the budget?

A. No. We are -- It is not just to balance the budget.

the rent-a-car facilities, for example?
A. I don't fully understand your question.
Q. Have you done, have you in trying to determine what
is fair rents to be charged, what is benefits -- what is
proper concession fees to be charged, have you, to fulfill
your responsibilities, done any studies to determine -- and
I'm taking the most gross for a start -- the cost of
operating the airfields, the airline counters, the gates,
runways, et cetera, et cetera, et cetera, in one sense
versus the rent-a-car companies in the other sense?
A. What we have looked at, the studies that we have
looked at in setting rates for airlines as well as for
rental cars, we have looked at rates that are being charged
by other airports across the country for airlines. We have
also conducted our own studies of what the various
percentage fees are charged by the various airports on, off

17 -- off-airport and on-airport rental car concessions. So
18 we have looked at what the market price from an airport
19 standpoint --
20 Q. Ms. Warner-Dooley, please answer my specific question
21 that I am asking.
22 MR. GALL: Your Honor --
23 BY MR. STURTZ:
24 Q. I did not ask, if I may --
25 MR. GALL: You interrupted her. She should be

allowed to answer the question.
THE COURT: Just a moment, counsel. Let me see if I can perhaps rephrase the question as I understand it.
Has the Authority conducted any formal investigation regarding the costs associated with the airport rental operation as compared to the charges made by the Authority for the privilege fee?
Is that your question, Mr. Sturtz?
MR. STURTZ: No, it isn't.
THE COURT: It isn't quite.
MR. STURTZ: I am going to get to this along my line of questions.
BY MR. STURTZ:
Q. But the first one is not how do you set the rates by looking at competition. My question to you was: Have you or the airport done any studies at Port Columbus International Airport that compares the costs of running the 10,000 foot runways, cleaning the runways, airline

counters, airline gates, all the things that are related to
the airline side versus the costs related to the rental car
side?
A. No, we haven't because case law makes it quite clear
you look at the entire airport as an entity in assessing
fees even for rental car operations. Rental car operations
benefit from the entire airport being available.

MR. STURTZ: Okay. I guess, Your Honor, I would like to be able to ask questions --
THE COURT: The answer is no to your question.
MR. STURTZ: That's all the answer that I am looking for, not her speeches as to justification. He can do it on redirect.
THE COURT: Her answer was no, and she explained her answer. I will permit her to do that. Go ahead, Mr. Sturtz.
BY MR. STURTZ:
Q. Ms. Warner-Dooley, you heard today that Hertz last year paid between one million one and one million two in concession fees. Does that sound about right?
A. Yes, it does.
Q. Would you look at please your Exhibit 2, Joint Exhibit 2, your operating capital budget, and look at page 2A of that document. That's behind two of the manila brown pieces. Do you see that?
A. Uh-huh.

Q. 2A? And it should be headed, Budget For Airline Rent
Charges And Landing Fees. Is that correct?
A. Yes.
Q. We're on the same page?
A. Yes.
Q. Am I correct that Continental Airlines for all of its

Q. Isn't it true that what you are doing is you are looking around to set these fees at what competition does at other airports and saying, that's the basis to set my fees, what the competition will bear, so I can balance my budget? Isn't that what you are really doing?
A. Looking at what the other airports are charging is a factor in determining what is the market value for the concession opportunity that we are offering.
Q. And that's the driving factor. It is not utilization. It is not cost of their -- of supporting them. It's what the market factors will get, what the market will bear, for your charges?
A. We look at, we need those revenues in order to -- yes, pay our operating expenses for current capital improvements, future capital improvements. That's what these moneys are going to, and we look at that factor, and that was one of the balancing factors in looking at a 50

18 percent exclusion for local traffic. That's one reason,
19 even though we decided to do a compromise, we didn't
20 exclude all local traffic. We need those revenues from 50
21 percent of the local traffic to help pay our various costs.
22 Q. And you need the revenues from the 50 percent of the
23 local traffic whether that local traffic has any burden or
24 any impact on your airport, isn't that correct?
25 A. That is a price that is paid, yes, as part of the

concession.
Q. Isn't it correct that you charge the 50 percent income on the local traffic whether or not there is any burden on the airport?
A. That is correct.
Q. You're charging that because you, as the administrator, saying that if you want to come on this airport, that's the fee I'm going to assess you rental car companies; is that correct?
A. That is correct and because of the benefit you get as a concessionaire, the exposure to all the local traffic that's going through our terminal.
Q. The local traffic as defined in the new contract doesn't go through your terminal by definition. If it did, it would be airport traffic?
A. They may not want to rent a car, but 50 percent of our traffic is leisure traffic, that is local residents that are going through the terminal. They may not rent a

car at the same time that they have flown; but when they
walk through the baggage claim, ah, Budget is at the
airport. I'll remember that the next time that I am
renting a car or Thrifty, National. There is a name
recognition benefit that an airport concession will derive.
Q. And for that you subtract a very substantial
privilege fee for coming onto the airport, getting that

smart. We want to have bidders. We don't get revenues under a concession agreement unless we have people bidding.

Q. But your position is that you could have done that?

A. Yes.

Q. That's within your jurisdiction at the airport to tax that -- to get a privilege fee for that service also?

A. It's in no way a tax. It's a privilege fee for under a concession agreement, concession opportunity, that is bid.

Q. And so if you want to come into the airport and have a counter, you could submit yourself to having a fee levied upon you for all the business of the company no matter where you have that business?

A. That is a business decision the bidders make. Thrifty for a long time has stayed off airport because of that.

Q. And you're saying that's correct. That's what Budget has to do. They have to decide if they will pay what you want from all their businesses, whatever you choose to extract, and then make the business decision?

A. They have to decide if they are willing to live with the terms of the concession as proposed and make that business decision.

Q. And you, because of your authority, have the right to say to Budget, I want 25 percent of Mill Run, downtown,

these other places. You have got that right, if you chose to use it?

A. I have the same right -- Any landlord has that right. You say the authority. When you have something that someone else wants, you have the ability, as part of the negotiations, to set the terms.

Q. And you believe that the fact that you are a government entity has no bearing on that?

A. Yes.

Q. That you are the same as a landlord. You can do anything a landlord can do. You have no additional restrictions because you're a quasi-government entity?

A. The concession agreement is a negotiated -- We are not bringing in our governmental authority. Our governmental authority comes in with the off-site rules.

Q. Your government authority comes from the enabling

17 statute. You are the governmental authority?
18 A. That authorizes us to enter into contracts; but the
19 terms, how we set up the business terms, is not because we
20 are a governmental entity. It is because we have an
21 opportunity that people wish to bid for.
22 Q. And it is because you have the power and you hold the
23 airport? You have got the airport in your hand?
24 A. It's a negotiation position, just like any
25 negotiating party.

Q. Now Max and Erma's is on the airport also, aren't they?
A. Well, they -- Actually, Anton Air Foods operates a franchise of Max and Erma's on the airport.
Q. Does Anton Foods have any other franchises?
A. Yes, they have a franchise for Massey's Pizza. They have a subcontract for Charlie's Steak House.
Q. All on the airport?
A. Yes.
Q. Do they have any off airport?
A. No.
Q. So by creating a separate corporation to do Max and Erma's and Massey's Pizza and Charlie's Steak House, all airport locations in a separate corporation, your position is you can't levy privilege fees on anything outside that corporate structure? On any other Max and Erma's?
A. That was never a contemplated term, and what I can do

and what I can't do -- It is wide open.

Q. Do you charge any fee to United Parcel Service for coming on your property and shipping their goods?

A. We charge them a courier fee.

Q. The answer is yes?

A. Yes.

Q. Because they're coming on the airport?

A. Yes, and using our loading docks, yes.

Q. Do you believe because they come on the airport and are using your loading docks, you could say to UPS, I want three percent of all your business in the City of Columbus for that privilege?
A. This is again not in the context of the concession opportunity that's being offered to UPS.
Q. You're letting them come on your property?
A. Uh-huh.
THE COURT: Let me make sure I understand. How does a courier fee -- Where is that found?
THE WITNESS: It is a flat $300 fee that's been imposed by the executive director.
THE COURT: Is it in the rules?
THE WITNESS: It's in guidelines that have been adopted by the executive director. Our board has not actually adopted those fees. That is part of what they have delegated down to our executive director.
I never make things simple, do I?
THE COURT: You understand, Ms. Warner-Dooley, I'm

simply trying to get a gasp of the operations of the airport. As I understand it, charges to off-site rental car companies that use -- come on to the airport property, those charges are fixed by the rules adopted by the board of directors?

THE WITNESS: That is correct.

THE COURT: Charges made to UPS or FedEx or similar courier services who are coming on and using the airport property, those charges are not fixed by the rules adopted by the board. Those charges are fixed and governed by the executive -- orders of the executive director of the airport?

THE WITNESS: That is correct. They are more similar to -- Our board does not set the fees in our parking lots as well. It's called a courier fee, but it's more of a parking right to park at the loading dock while they drop off their packages.

THE COURT: Does the executive director of the airport fix and determine the parking fees at the airport parking lots and airport garage?

THE WITNESS: Yes.

THE COURT: And those fees vary, whether it's long-term parking, short-term parking or -- Isn't that true?

THE WITNESS: Yes, Your Honor.

THE COURT: And the board has delegated that authority to fix parking lot fees and courier fees to the executive director of the airport?

THE WITNESS: Yes, sir.

THE COURT: And he fixes those subject to board approval, or just he fixes them?

THE WITNESS: He fixes them; and if there is any complaints by board members, he hears about it.
THE COURT: Are there any other fees fixed by the executive director of the airport? In addition to parking fees and courier fees?
THE WITNESS: Not that I can think of right off, Your Honor.
THE COURT: Thank you, Mr. Sturtz.
BY MR. STURTZ:
Q. Ms. Warner-Dooley, a courier fee that you say that the executive director has assessed at $300, that number came from -- Do you know where?
A. That was a recommendation by the ground transportation supervisor.
Q. By what please?
A. By the ground transportation supervisor.
Q. And you send a bill to UPS and FedEx for $300, your Airport Authority does, and they pay that fee?
A. APCOA sends that bill to -- APCOA is our parking lot

management company. They send it to those companies, and
my understanding is they pay those fees. I do not directly
oversee that, but it is my understanding they pay those
fees.
Q. So you subcontracted that to APCOA?
A. APCOA is a parking lot manager. So they're our

manager --
Q. They're working for you?
A. Yes.
Q. So you are the one that sets the fees. They just collect it for you?
A. Right.
Q. You're telling us you set the fee at $300; and to do that, you did not do any studies to say what the burden on the roads or the facility are for UPS. You just took a $300 number?
A. Again, I did not make that decision.
Q. As the $300 number was assessed, the Airport Authority could, because UPS and FedEx want to come on to your roads, on to your loading docks, could have said, your fee is this way. It is $300. But we need more income for the airport; and, therefore, it's going to be $300 fixed plus one percent of all gross revenues for your local business in Columbus, Ohio. Could you have done that?
A. Are you saying pursuant to that contract?

Q. Pursuant to --

A. Yes.

Q. -- the way you set it up. You said, we chose to set it up at $300. Could you have chose to set it up $300 plus one percent of all the gross business in Columbus, Ohio?

A. Probably not since the courier fee is not by a

contract. That's similar to our off-airport rent-a-car rules where we are only looking at the airport-related traffic.

Q. You, as the contract official, could make the rule that no one, no courier fee -- no courier company shall come on the airport without a contract. You could have done that, right? It's your airport. You could have done that?

A. I'm trying to think through that. They are a member of the public. There is no way we could stop them from parking in our public parking lots and walking into our terminals.

Q. But coming to your loading docks --

A. Yes, we could set a loading dock fee.

Q. That you could do by contract or by rule or regulation. You have got lots of choices. It's your choice whether you use a rule, regulation or contract?

A. When a contract is used -- A rule is when there is no agreement on the part of the other party. A contract is, there is a choice on the other party if they want to go into this or not.

Q. And you have the power to say to FedEx and UPS, this is your choice. If you want to use the airport loading docks, which the airport built, benefits you, these airplanes are going to carry your packages, if you want to

use these, you shall sign a contract. That's the first thing that you could do, isn't that correct?
A. We have the right to set user charges and fees for the use of our property. Frankly I would have to go and analyze -- and we are also empowered to enter into contracts; but requiring someone to enter into a contract to have access, I have to analyze the statute.
Q. To your loading dock that you constructed?
A. Right.
Q. No different than the parking garage that you are constructing, is it?
A. Except --
Q. No difference.
A. You're talking about the rental car facilities or the parking garage?
Q. Talking about the rental car facilities that you are building and charging to the rental car companies, just the

same as you could, if you chose to, you built the loading
dock, that you can charge that through. No difference?
A. I see a very large difference because the parking garage is part of the overall concession package.
Q. Is there anything in your statutes that you know of,
your statutory authority, that prohibits you from charging
a user fee on your loading docks?
A. No.

Q. You have that capacity, don't you?
A. Yes, we have the right to charge user charges or fees.
Q. And you have the power then to say, those who use this loading dock shall sign a contract for the use of that loading dock?
A. As I stated earlier, I would want to read the statutes to see if I had the authority to enter into contracts. I would want to make sure.
Q. If you found, when you read the statute, you had the power to enter into such a contract, then do you believe you would also have the power to tax the one percent or assess a fee of one percent of their local business for deliveries in Franklin County?
A. That would be a choice that they make on using the loading dock. So again, they can always decide if that's too high of a cost, they can use our parking lot instead

and going through the terminal.
Again, it is always a business choice that's made, particularly in the context of a contract. That's why it's different than rules.
Q. When a local customer of Budget's goes to Mill Run to pick up its car and then drives off on the freeway, there is no burden on the airport in that transaction; is that correct?

A. That is correct.
Q. And when they come to Stelzer Road, property owned by Budget, to pick their car up there, the local customer, and make a right and get right up on the freeway, that's -- there is no burden on the airport in that situation either, is there?
A. No.
Q. You told us that it's your belief that Budget benefits from its local business because it has got that exposure in the airport. You told me that a few minutes ago?
A. Yes.
Q. Have you ever done any studies to support that?
A. No, we have not. Some things seem to be common sense when you walk through. And Budget recently increased the size of its sign. It wasn't needed for directional

purposes. So it must have been for advertising purposes.

And the air travelers were already going to find them. So

to me they were trying to capture another group.

Q. To have that sign there, and you have got a minimum

guarantee of $540,000, don't you? For next year?

A. This is under the new proposed contract. I assume

you are reading the tabulation sheet?

Q. Yes.

A. I would have to check what their current minimum

A. No. As I said, in compromise quite often there isn't agreement.
Q. But they still never agreed?
A. They signed a contract agreeing that these were the terms. If we accepted their bid, we could sign a contract, and this would be the terms and conditions.
Q. But Budget didn't do it that way, did they? They first sued you. Then they submitted a contract?
A. Yes.
Q. Doesn't that indicate to you that they didn't like it?
A. Yes, but you have to make a business decision if you like the terms or not. They were always free to be an off-airport operator; and you would not have to pay on local traffic, and you get the benefit of the eight percent lower fee.

Q. Under your concept of appropriate charges, am I
correct that you know that Budget at their Stelzer facility
does work for Ford Motor Company, prep work for Ford Motor
Company?
A. I am aware they have a repurchase program with Ford
Motor Company.
Q. Are you aware they do work, they do warranty work and
repair work, at their Stelzer facility for Ford Motor
Company?

A. I have no knowledge regarding that.
Q. If they do, would that be airport-taxed revenues?
A. Warranty work? Not relating to rental cars?
Q. Yes. Because it's done on site?
A. If it's done on site, I am quite willing to give, if they can show that is separate from their rental car operations. What this is looking at is the rental car operations.
Q. I am trying to understand your gross revenue concept.
Is it your testimony that if they can show that they're doing warranty work and they are doing prep work for Ford
Motor Company on that location --
A. Unrelated to the rental car operation.
Q. Unrelated to the rental car operation, then you would
say that's not appropriate to be in your gross revenue compensation for the concession fee?
A. I can look at how the whole thing -- Again, this is
always looking at rental car operations. I want to make
sure how it fits in, but I think that's a reasonable

question. I wish the issue had been raised because we already excluded long-term leases and everything because it was an issue, how it wasn't related to rental car operations.

Q. If it's not related to rental car operations, you are saying it shouldn't be in the airport privilege fee

calculation?
A. I'm saying that we are willing to look at and see how
it fits in with all the definitions.
MR. STURTZ: Your Honor, I wish to ask a question
or two of Ms. Dooley of Exhibit 18, the NAAG, a document
which I have objected to any reference to being made, to be
preserved. So I don't want to waive, but I need to ask a
question or two to show why this is totally inappropriate.
I want to ask them without waiving, unless you are going to
rule at this point on its inadmissibility. I guess the
question that I am raising is if you are ruling it
inadmissible, but I don't know where you are coming down.
THE COURT: I have reserved ruling on it, Mr.
Sturtz.
MR. STURTZ: I wanted to ask then one or two
questions, and that's not to be considered a waiver of my

position is my point. Is that agreeable with Your Honor?

MR. GALL: It is not agreeable to me. If he wants to get into the document, then all bets are off as far as I'm concerned.

MR. STURTZ: He can't have his cake and eat it, too.

THE COURT: Mr. Sturtz, do whatever you want to do. If you want to think about it, we'll take a ten-minute recess.

subject of a separate negotiated agreement?
THE WITNESS: Correct.
THE COURT: All right. Mr. Sturtz?
BY MR. STURTZ:
Q. Just following up with what the judge is talking about, Enterprise and Payless, both are not under contract.
They are under rules, correct?
A. They are under -- They are not under the concession agreement. They are under separate contracts that refer to the off-site rules and set parameters for operating, but they may also pay an additional -- They pay a higher fee for being in their proximity to the terminal as well as the relationship. They have access to the airport hotel customers as well as airport hangar users.
Q. So they're under the rules, Exhibit 17, and they're under contract, and they're on airport property, although they are sublessees?

A. The rental car transaction, the car pickup, and I don't know about drop-off frankly, but I assume the drop-off occurs on airport property, their service facilities, like the Enterprise service facility I think is on Broad Street; and Payless, frankly I am not sure where their service facility is located. So the customer is signing the contract on airport property.

Q. And their airport facilities are on airport property.

They are at Lane hangar and at the Concourse Hotel, both on airport property?
A. Particularly, again I don't know all the details about the hotel, but at Lane there is no particular facility. They will pull the cars into Lane's parking lot.
The contract is signed at Lane's counter.
Q. The contract is signed at Lane's counter. They are agents for Enterprise for that purpose, and it on their property, the airport property?
A. Yes.
Q. At the Concourse they actually have a table there, and Payless works at the Concourse facility, right?
A. Payless works at the Concourse facility. I don't know about their operations.
Q. In fact Payless is the closest rent-a-car facility to the terminal. We're -- Budget is a mile down the street. They're right alongside, aren't they?
A. Your counter -- your Budget counter --
Q. I'm talking about the facilities.
A. But the facility that you are talking about is

Payless's equivalent of a counter. Budget's equivalent of a counter is within the terminal building.

Q. Where are their cars?

A. I don't know where the Payless cars are stored.

Q. Right on the facility?

1991 WL 160044

ASSOCIATIONS CONVENTIONS TRADE SHOWS, INC., Plaintiff-Appellant,

v.

BOARD OF FRANKLIN COUNTY COMMISSIONERS and Board of Trustees, Franklin County Veterans Memorial, Defendants-Appellees.

No. 91AP-79.

Court of Appeals of Ohio, Tenth District, Franklin County.

Aug. 15, 1991.

Appeal from the Franklin County Court of Common Pleas.

OPINION

TYACK, Judge.

Associations Conventions Trade Shows, Inc., is a corporation which derives most or all of its income from providing decorating services at a variety of exhibition events in central Ohio. One of the exhibition sites frequently used is Veterans Memorial. Veterans Memorial is owned by Franklin County but administered

day-to-day by the Board of Trustees, Franklin County Veterans Memorial ("the Board"), having been so designated by the Board of Franklin County Commissioners.

Associations Conventions Trade Shows, Inc., ("ACT") enters into contracts with various trade shows, conventions and exhibitors to provide services. The trade shows, conventions and/or exhibitors in turn contract with the Board for the right to use and occupy portions of Veterans Memorial to stage their particular event.

In 1977, ACT entered into an agreement with the Board under the terms of which ACT would pay to the Board specified percentages of its gross receipts derived from services provided at Veterans Memorial for the exhibitors with which ACT had contracts. This initial agreement, into which ACT now claims it entered under protest, lasted until the end of calendar year 1984. ACT refused to enter into a new agreement at the termination of the old agreement, despite the Board's demands that ACT enter into such an agreement if ACT were to continue providing services at Veterans Memorial.

ACT entered into new contracts with exhibitors to provide services at Veterans Memorial but was prevented from entering the premises. ACT then filed suit in May of 1985 against the Board of Franklin County

Commissioners and the Board of Trustees for the Franklin County Veterans Memorial.

In August of 1985, the defendants in the civil action filed for and obtained summary judgment, which was overturned by this court on appeal.

Upon remand, ACT filed an amended complaint. Following discovery, the defendants filed a second motion for summary judgment. The trial court granted summary judgment for the defendants on the theories of liability added to the action via portions of the amended complaint, but it overruled the motion as to the theories contained in the amended complaint which had been part of the original complaint. ACT then dismissed the original claims and timely filed a notice of appeal as to the issues decided in the second summary judgment motion.

Appellant ACT has submitted a single assignment of error for review:

> The trial court erred in granting defendants-appellees' motion for summary judgment, since defendants-appellees are not entitled to judgment as a matter of law and genuine issues of material fact exist with respect to (1) whether the Board of Trustees of Veterans Memorial exceeded the scope of their [sic] statutory powers in adopting and imposing the convention services contractor agreement, (2) whether the percentage rebate fees imposed by the convention services

contractor agreement for the privilege of entering onto Veterans Memorial to perform decorating services constitutes an illegal tax, and (3) whether the imposition of the percentage rebate fees on the decorators under the convention services contractor agreement constitutes a violation of the equal protection clauses of the Constitutions of the United States and the State of Ohio.

*2 Veterans Memorial and its board are authorized by and guided by R.C. 345.01 through 345.18. R.C. 345.12 specifically allows for the building of a soldiers' memorial and permits the board of trustees for such a memorial to " . . . make such contracts, and such purchases of supplies and materials as are necessary. . . ."

R.C. 345.13 allows the applicable board of trustees to " . . . make rules and regulations for the use, administration, and maintenance of such memorial as is fitting and necessary to carry out the purposes thereof. . . . The board may establish rental fees and other charges for the use of the memorial, and it may waive any portion of such charges."

The Board argues that R.C. 345.13 authorizes the agreement it demands of certain businesses which provide services at Veterans Memorial. The Board acknowledges that no in-depth study has been made of the costs incurred in permitting and assisting businesses

such as ACT in providing services at Veterans Memorial, so the Board cannot say whether or not there exists a reasonable correlation between the percentage of gross receipts sought under the proposed contract with ACT and the actual costs to Veterans Memorial.

Appellant ACT argues that since no such correlation has been demonstrated, the Board has (1) exceeded the scope of its statutory powers, (2) levied an illegal tax, and (3) treated ACT in a way that constitutes a violation of the equal protection clauses of the Constitution of the United States and of the state of Ohio.

Appellant submits that the arrangement offered by the Board is not a contract but a license. Appellant then suggests that establishing a system of licensing vendors and service providers at Veterans Memorial exceeds the statutory authority of the Board.

The Black's Law Dictionary (5 Ed.1979) 829, definition of "license" includes the following:

> The permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort . . .
>
> A permit, granted by an appropriate governmental body, generally for a consideration, to a person, firm or corporation to pursue some occupation or to carry on some business, subject to regulation under the police power. A license

is not a contract between the state and the licensee, but is a mere personal permit. . . .

License with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property." (Citations omitted.)

Similar definitions for "license" are to be found in Ohio case law.

The arrangement sought by the Board does seem to be a form of licensing under the definition set forth above. However, R.C. 345.13 expressly authorizes the Board to establish fees " . . . and other charges for the use of the memorial . . . " and " . . . to make rules and regulations for the use . . . of such memorial . . .." Thus, the statute authorizes the Board to establish a licensing system for vendors and service providers at Veterans Memorial and the Board did not exceed its statutory authority by asking ACT to meet certain conditions before it could perform its services on the premises.

*3 The third portion of appellant's assignment of error argues that the Board's actions constitute a denial of equal protection because not all groups of vendors and service providers are requested to pay a sum in order to do business at Veterans Memorial. Thus, appellant submits that telephone companies, florists, food vendors that provide food to concessionaires,

trucking companies making delivery to Veterans Memorial, audio-video services, computer registration systems, photographers, refrigerator/freezer services companies, compressed air service companies, and many others are not assessed in the way businesses such as ACT are assessed.

While arguably the Board would be well advised to take appellant's list, determine what the costs may be to Veterans Memorial of each of the listed service providers pursuing their business on the premises, and then charge each of the providers in accordance therewith, the failure of the Board to do that to date does not constitute some invidious classification or discrimination in violation of the equal protection clauses of the Constitution of the United States and of the state of Ohio. A reasonable distinction can be ascertained between the businesses listed by appellant and businesses in the group to which appellant belongs, based upon factors such as duration of time on the premises, risk of harm to the premises, and the extent to which Veterans Memorial provides support services and equipment to businesses such as appellant.

As a result of the foregoing, the summary judgment of the trial court is sustained in part. The trial court did not err in determining that the Board acted within its statutory authority in attempting to re-institute what amounts to a licensing arrangement and in ruling that

the Board did not deny equal protection in treating the group to which appellant belongs differently from some other service providers. Summary judgment as to these theories is sustained.

The trial court also did not err in determining that the Board is not engaged in a pattern of discrimination between decorators such as ACT. The only evidence implying such submitted by appellant is a sole incident in which an individual sign company was permitted on one occasion to perform decorating services as a favor to appellant and then was not pursued by the Board to recover a percentage of gross receipts. This single incident does not constitute the pattern of discrimination required to establish a violation of the equal protection clauses.

The second theory set forth in appellant's assignment of error, however, has merit. Given the utter failure of the Board to ascertain the costs to Veterans Memorial of ACT and other service providers conducting business on the premises, a genuine issue of material fact exists as to whether the sums sought by the Board constitute an alleged tax on ACT and those similarly situated.

R.C. 345.01 sets forth the way in which taxes may be assessed for the establishment and maintenance of a veterans memorial. The statute does not contemplate the levying of a tax under the circumstances and via the methods presented here.

*4 If ACT can prove that no reasonable correlation exists between the sums sought by the Board and the cost to the Board of businesses such as ACT performing their services, then ACT can prevail. If the Board can establish that a reasonable correlation does exist between the sums sought and the Board's costs, then the Board can prevail. At present, this material fact is unknown and constitutes a genuine issue. Therefore, summary judgment was inappropriate and the judgment of the trial court granting summary judgment is reversed as to this particular issue as to the Board.

The final matter to be resolved is the potential liability of the Board of Franklin County Commissioners. As indicated in the trial court, the Board of Franklin County Commissioners has designated the Board of Trustees, Franklin County Veterans Memorial as sole and exclusive agent to act on its own behalf in the management and operation of Veterans Memorial. This designation, however, does not make the Board of Franklin County Commissioners liable for the acts of the Board of Trustees, Franklin County Veterans Memorial where, as here, the latter board is exercising powers expressly given to it by statute.

We have held above that the Board of Trustees was acting within the scope of the authority conferred directly upon it by R.C. 345.01, et seq. Under the circumstances, the doctrine of respondeat superior ("let

the master answer") does not apply. The actions of the Board of Trustees are its own acts as authorized by statute, notwithstanding the fact that actual title to the land is in the name of Franklin County and notwithstanding the fact that the Board of Commissioners for Franklin County appoints the members of the Board of Trustees to their terms. The Franklin County Commissioners do not have the power to take away the statutory powers conferred on the Board of Trustees or to control the actions of the Board of Trustees which are in accord with the authority granted by law. With the loss of control, the Board of Franklin County Commissioners also loses the liability for potential errors of the Board of Trustees.

Summary judgment was appropriately sustained as to the issue of liability of the Board of Franklin County Commissioners.

Accordingly, the assignment of error is sustained in part and overruled in part. The judgment of the trial court is reversed as to the Board of Trustees, Franklin County Veterans Memorial on the issue of whether or not the sums sought to be assessed are an illegal tax because not reasonably correlated to the cost to the Board of Trustees of the appellant and those similarly situated conducting business at Veterans Memorial. The cause is remanded for that issue to be addressed in the trial court.

The judgment of the trial court as to the Board of Franklin County Commissioners is affirmed.

Judgment affirmed in part, reversed in part; cause remanded.

WHITESIDE and HOFSTETTER, JJ., concur.

1989 WL 52940

ASSOCIATIONS, CONVENTIONS, TRADE SHOWS, INC., Plaintiff-Appellee,

v.

The OHIO EXPOSITIONS COMMISSION, et. al., Defendants-Appellants.

The GEORGE C. FERN COMPANY, Plaintiff-Appellee,

v.

The OHIO EXPOSITIONS COMMISSION, et al., Defendants-Appellants.

Nos. 88AP-784, 88AP-886.

Court of Appeals of Ohio, Tenth District, Franklin County.

May 18, 1989.

Appeals from the Franklin County Court of Common Pleas.

Means, Bichimer, Burkholder & Baker Co., L.P.A., and Robert M. Morrow, for appellee Associations, Conventions, Trade Shows, Inc.

Porter, Wright, Morris & Arthur, Mark Merkle, Jr., and Jean Y. Teteris, for appellee The George E. Fern Company.

Anthony J. Celebrezze, Jr., Attorney General, and Robert W. Patchen, for appellants.

OPINION

REILLY, Judge.

*1 Plaintiff, The George E. Fern Company ("Fern") filed a complaint in the Franklin County Court of Common Pleas against defendants, the Ohio Expositions Commission ("commission"), its general manager, and individual members seeking both injunctive and declaratory relief. It was alleged that the commission had no authority to require payment of a percentage of gross receipts to do business in facilities operated by the commission.

Thereafter, plaintiff, Associations, Conventions, Trade Shows, Inc. ("ACT"), also filed a complaint seeking both injunctive and declaratory relief against defendants.

The cases were consolidated for purposes of trial. Stipulated facts were submitted to a referee of the court. The referee presented his report to each judge, wherein it was recommended that the relief sought by both plaintiffs be granted. The judge in the ACT case adopted the recommendations of the referee, and enjoined defendants against enforcing their plan. The judge in the Fern case wrote a separate decision adopting the recommendations of the referee.

Defendants have timely filed notices of appeal and the cases have been consolidated by agreement of counsel. The following assignments of error are asserted:

1. The trial courts erred in finding that the Ohio Expositions Commission's operation of the fairgrounds constitutes a governmental function rather that a proprietary function.

2. The trial courts erred in finding that the proposed decorator agreement was a governmental license rather than a proprietary license.

3. The trial courts erred in finding that the proposed decorator agreement lacks the essential elements of an enforceable contract.

4. The trial courts erred by applying the wrong standard of review in analyzing the alleged equal protection violations, and in finding there was an equal protection violation.

5. The trial courts erred in holding that the decorator agreement is violative of laws of this state and must be enjoined.

Both Fern and ACT are Ohio corporations in the business of providing exhibition decorating services at various locations, including the Expositions Center. The commission is a state commission charged with managing the Expositions Center. Defendant, Jack C. Foust, is general manager of the Expositions Center. His duties include responsibility for operations at the center as they pertain to the state fair and non-fair activities.

Apart from approximately three weeks each year in which the commission holds a state fair at the Expositions Center, the commission rents one or more of the state-owned buildings at the Expositions Center to persons who conduct trade shows or other types of events during the remainder of the year. Usually a sponsor rents the building or buildings from the commission. In most cases, the rent charged to the sponsor for the building is a flat daily rate.

The rental agreement between the commission and the sponsor gives the sponsor occupancy of the building twenty-four hours per day during the term of the rental. If the sponsor who rents the building desires outside decorator services, it enters into an oral or written contract with the decorators, such as Fern and ACT, who then go into the building rented by the sponsor to set up booths, hang the drapes, hang signs and banners, place tables and chairs required and otherwise prepare the building for the show.

*2 Prior to 1985, Fern and ACT, as well as other exhibit decorators, were not required to pay any fee to enter the public-owned lands and buildings at the Expositions Center for the purpose of providing decorating services to its customers. For the years 1985 and 1986, the commission established a requirement that decorators pay either $100 per month or $600 annually to purchase a Decorator Operating Permit

("decorator permit") for the right to enter into the Exposition Center to serve their customers. Mr. Foust stated that this payment was sufficient to cover parking and access to the buildings, as well as time spent by exhibition personnel working with the decorators.

On January 22, 1987, Mr. Foust notified Fern and ACT by letter that, effective July 1, 1987 and each year thereafter, in lieu of purchasing a decorator permit, Fern and ACT would be required to sign an agreement to pay to the commission ten percent of the gross receipts from any revenue generated at the Expositions Center. If Fern and ACT did not sign an agreement, they would be denied access to the Expositions Center. Moreover, the commission changed the form of its rental agreement with the sponsors using the fairground facilities, reserving to the commission the right to control decorating activities. Previously, the sponsor had the option of decorating without the use of a contracting decorator.

Mr. Foust testified that the decorator permit, which at most cost $600 in 1985 and 1986, gave Fern and ACT the right to come onto the Expositions Center and fulfill its contracts with its customers. He also testified that the agreement did not give Fern and ACT any additional rights or privileges that they did not have under the decorator permit system in effect the previous two years.

When asked if the agreement was the same as the decorator permit with a new name, Mr. Foust agreed.

The rationale for the increase, according to Mr. Foust, was to recoup the money for damages to the facilities caused by the decorating companies operating at the shows. Mr. Foust admitted that he was unaware of any damage done by either Fern or ACT. He stated that the commission had made no study or estimate to determine the amount of damage done by the decorators. He also said that he did not know the amount of damage done by the decorators on a dollar basis or the additional costs incurred by the commission in allowing the decorators to come onto the Expositions Center.

Neither Mr. Foust, the assistant general manager, nor the rental concessions manager could recount a specific instance of damage done by Fern or ACT during their operations at the Expositions Center. The rental concessions manager stated that he did not know of any general or specific additional costs associated with allowing the decorators onto the Expositions Center to complete their contracts and that he was not aware of any estimates. The administrator in charge of maintenance of the buildings also stated that he could not recall any damage done to the buildings.

*3 Further, Mr. Foust agreed that the ten percent figure was arbitrary in that it "might be high, might be

low." It was stipulated that numerous other individuals and businesses which entered the Expositions Center, and provided goods and services to sponsors or individual exhibitors at trade shows and other events, were not required to pay any flat or percentage fee for the privilege of doing business at the Expositions Center. When asked why these other individuals or businesses were not being charged a percentage of their revenues, Mr. Foust answered that it had not been considered.

In the executive budget for the biennium 1987-1989, the commission's operating expenses were eliminated. The capital improvements and maintenance funds were not cut. The commission raised the rental fees for the buildings to sponsors by ten percent, effective July 1, 1987, and increased the parking fees and labor rates for renters of buildings at the fairgrounds, and raised the admission price to the Ohio State Fair. The commission's reason for the increase in fees to the decorators was the need to raise revenues for the operation of the fairgrounds, and to recover the costs of damages by decorators.

The agreement would have cost Fern in excess of $20,000 for the same rights which cost Fern $600 in 1985-1986, representing a 3,300 percent increase. For ACT, the agreement would have involved in excess of $6,000 for the same rights which cost ACT $600 in 1985-1986, representing a 1,000 percent increase.

The referee essentially found that the agreement constituted a tax; that defendants did not have the authority to impose such a tax under R.C. 991 et seq.; that defendants were acting in a governmental capacity and were not permitted to raise revenues to curb operating expenses; that the income arrangement was unreasonably discriminatory and outside the scope of defendants' authority pursuant to R.C. 991 et seq.; that the agreement is essentially a licensing or permit fee; that it was disproportionately high, constituting a denial of due process; that because of its excessive nature, the licensing fee constituted an unlawful tax; and that Fern and ACT were denied equal protection and due process.

In the first assignment of error, defendants contend that the trial court erred by not finding that the commission's operation of the fairgrounds constitutes a proprietary function rather than a governmental function. R.C. 991.03 describes the commission's powers in relevant part:

> (A) The Ohio expositions commission shall:
>
> . . . (2) Maintain and manage property held by the state for the purpose of conducting fairs, expositions, and exhibits.
>
> (B) The commission may:
>
> . . . (3) Enter into contracts that the commission deems necessary or worthwhile in the conduct of its purposes, provided, that

> contracts made for a term exceeding two years shall be subject to the approval of the controlling board; . . .
>
> (5) Grant leases on all or any part of the property, land, or buildings under the management of the commission to private or public organizations, which appear to be in the best interests of the state, . . .

Defendants maintain that they were not operating in a governmental capacity but in a proprietary capacity, and hence were not subject to the normal restraints imposed upon a governmental agency. Acting in such a capacity, Fern and ACT contend that they may generate sufficient revenues to cover operating costs. The cases which defendants rely upon are inapplicable. See Moloney v. City of Columbus (1965), 2 Ohio St.2d 213; Schenkolewski v. Metroparks System (1981), 67 Ohio St.2d 31; Dean v. Board of Trustees (1940), 65 Ohio App. 362; Eversole v. Columbus (1959), 169 Ohio St. 205; and State, ex rel. White v. City of Cleveland (1932), 125 Ohio St. 230. Those cases involve municipalities, rather than state agencies, which were asserting sovereign immunity as a defense to tort and contract claims.

In Moloney, supra, the city of Columbus was operating a zoo and a child was bitten by an animal. The Supreme Court found the operation of the zoo to be

proprietary because Columbus was not required by statute to operate a zoo and that the benefits of the zoo inured primarily to city and not the state.

The Schenkolewski, supra, case also involved a personal injury which occurred at a zoo. Suit was brought against the Cleveland Metroparks System, a political subdivision of the state. The court found that the operation of the zoo was proprietary since the acts performed were " . . . in the pursuit of private or corporate duties for the particular benefit of the corporation [the municipality] and its inhabitants. . . ." Id. at 37.

The case of Dean, supra, also involved a personal injury action brought against the city of Newark, which was operating the Sailors and Soldiers Building in a proprietary function for the exclusive benefit and profit of the city of Newark and not for the benefit of the state. The court found that the city was not entitled to governmental immunity since the city was not obligated by statute to operate the building and the city leased the building and received all the compensation and profits itself. The Eversole, supra, and White, supra, cases also involved tort actions brought against municipalities who were conducting voluntary operations for the benefit of the particular subdivision and not for the state.

The Supreme Court in Haverlack v. Portage Homes, Inc. (1983), 2 Ohio St.3d 26, 29, stated:

> Attempts to classify municipal functions into these two categories [governmental and proprietary] have caused confusion and unpredictability in the law. '[T]he classification of particular functions of municipalities has been difficult and frequently leads to absurd and unjust consequences.' . . . '[I]t is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions . . .'

*5 The governmental versus proprietary distinction has not been used to expand a governmental entity's rights, as the previous cases indicate. The distinction has been invoked to overcome defenses of sovereign immunity to tort and contract claims. The cases relied upon by defendants do not apply since the commission is an agency of the state and not of a municipality, and the commission is obligated by statute to manage and operate the Ohio Expositions Center and any commercial use of the building for the benefit of the citizens of the entire state and not for a local municipal corporation. In that respect, we note the reasoning of the trial court, which stated in its August 2, 1988 decision:

> In this case, the Court is of the opinion that the Referee was correct in finding that the defendants are acting in a governmental capacity in imposing the 10% fee upon plaintiffs. Defendants' operating authority is statutory.

> Under R.C. § 991.03, defendants are charged with maintaining and managing property held by the state for purposes of conducting exhibits. Included in maintenance of the state property is the regulation of persons permitted access to the fairgrounds to conduct exposition related business.
>
> In short, the Court concludes that the Referee was correct in finding that defendants are 'legislatively granted authority to maintain the state property at issue in the best interests of the sovereign.' . . ."

Therefore, defendants' first assignment of error is not well-taken.

In the second assignment of error, defendants contend that the trial court erred in finding that the proposed decorator permit was a governmental license rather than a proprietary license. Since the trial court correctly found that the commission was not acting in a proprietary capacity, the second assignment of error is also not well-taken.

The characterization of the agreement, i.e., whether it was properly construed as a permit or license rather than a contract, will be discussed in the following assignments of error.

Defendants' third assignment of error involves the question as to whether the trial court erred in finding that the agreement constituted a permit fee instead of

an enforceable contract, and whether such fee was excessive and imposed for revenue-raising proposes, thereby constituting an unlawful tax. The trial court found that the agreement was permanent and disproportionately high and unreasonable in relationship to the services provided to Fern and ACT.

Since the agreement does not provide or grant a property right, it is not a lease. See Cleveland Concession Co. v. Peck (1953), 159 Ohio St. 480. The agreement allows defendants access to the Expositions Center. At issue then is whether this agreement is a contract permissible under R.C. 991.03(B)(3).

A lease grants the right of possession of the premises and exclusive occupation for all purposes not prohibited by its terms or by law. A license to do an act upon certain premises, however, grants occupation of the premises by the licensee only as is necessary to do that act. DiRenzo v. Cavalier (1956), 165 Ohio St. 386. The agreement is a permit or license precisely the same as the decorator permits which were issued in 1985 and 1986.

*6 A permit or license issued by a sovereign is not a contract but is a condition precedent to the right to carry on business. See State, ex rel. Zugravu, v. O'Brien (1935), 130 Ohio St. 23. As the trial court noted, the payment of ten percent of gross revenues provided in the agreement is a condition precedent to the right to

carry on business at the Expositions Center. Thus, it is a permit or license and not a contract. As indicated above, Mr. Foust acknowledged that the agreement did not confer additional rights or privileges to the decorators. He stated that "the rebate agreement was the same thing as the operating permit with a new name."

The issue is whether the agreement was an attempt by the commission to unlawfully tax Fern and ACT. The license fee may be for regulatory purposes only, and may not be imposed to generate revenues. See Auxter v. City of Toledo (1962), 173 Ohio St. 444. See, also, Teamster's Housing, Inc. v. City of East Cleveland (March 12, 1987), Cuyahoga App. No. 51763, unreported.

The fee must have a reasonable relation to the burdens imposed by the activity being licensed. As generally explained at 51 Ohio Jurisprudence 2d (1962) 30- 31, Taxation, Section 15:

> As a general rule, if the amount imposed as a condition precedent to the carrying on of a business or occupation or some other privilege is sufficient merely to cover administrative expenses and regulation, it is regarded as a license fee rather than a tax, but if it exceeds such amount it becomes a revenue measure and its imposition constitutes taxation. . . . [I]f the exaction goes no further than to cover the necessary expenses of

> issuing the license, it does not, but if it is made as a means of supplying money for the public treasury, it is a tax. . . ."

Therefore, when a governmental entity charges a license or permit fee for the privilege of conducting business which exceeds the costs incurred by the governmental entity relating to the licensed activity, the charge becomes a revenue measure, and its imposition constitutes taxation. See Firestone v. City of Cambridge (1925), 113 Ohio St. 57.

In Firestone, the Supreme Court nullified an ordinance passed by the city of Cambridge prohibiting the use of any vehicle on city streets unless the user paid to the city a fee equal to twenty-five percent of the amount the user paid to the state of Ohio. The court noted that the amount to be raised was $9,000, but that only $400 was needed to cover the costs of issuing the licenses. It held that since the license fee was to be used for raising revenues, it was an illegal tax. The court stated:

> . . . It seems impossible to escape the conclusion that it was not, nor was it intended to be, a regulatory measure, but that, by whatever name it may be called, it is in fact an excise tax imposed for the purpose of raising revenue. . . Id. at 65.

In Teamster's Housing, Inc., supra, the Eighth Appellate District affirmed the decision granting summary judgment in favor of Teamster's Housing, Inc. The court found that a ten dollar fee per dwelling unit imposed upon apartment building owners was unconstitutional since the fees were actually imposed to raise general revenues and not imposed for regulatory purposes. The court concurred with the trial court's finding that:

> *7 . . . Although the city had the constitutional authority to charge a licensing fee, it was bound to impose a fee that reasonably related to the burden imposed upon the city. The court found the fee of $10 per unit unreasonable, arbitrary and discriminatory. It held the fee unconstitutional, stating it was 'a tax disguised as a license fee.' Id. at 2.

In Richmond Heights v. LoConti (1969), 19 Ohio App.2d 100, the city enacted an ordinance imposing a $100 license fee on distributors of mechanical amusement devices or juke boxes. The city did not impose a similar fee on other distributors operating within the city. The court found that the ordinance was unconstitutional since the fee did not bear any reasonable relationship to the burdens imposed upon the city in regulating the activity.

In this case, in 1985 and 1986, defendants charged a permit fee of $100 per month or $600 annually which was adequate to cover the costs incurred by defendants. In 1984, Mr. Foust wrote a letter to Fern stating that the $600 decorating fee was sufficient to cover parking, access to buildings, and some time spent by expositions personnel in working with the decorating company.

The commission could not specify any other additional costs involved with the decorators, nor could it establish any additional costs to the commission in allowing the decorators to enter the Expositions Center. Further, the commission could not show any damages caused by the decorators such as Fern and ACT.

It is apparent that the imposition of the ten percent fee constitutes an impermissible tax for the purpose of generating revenues in excess of any costs that the commission would incur. In a letter dated January 22, 1987, Mr. Foust stated that the commission had spent $900,000 during the past year and that:

> In order for us to recoup some of our expenditures and provide for increased operating expenses, we are adjusting current charges and initiating new ones. As part of this adjustment, a new decorating service charge will be effective July 1, 1987. . .

The expenditures, however, were paid out of the General Revenue Fund. See Amended H.B. 798. It is

apparent the fee was impermissively imposed to generate revenues after the commission's operating expenses were eliminated.

Thus, the trial court correctly found that the ten percent fee was excessive and disproportionate to any costs incurred by the commission; that the fee was imposed for revenue-raising purposes; and that such fee constituted an unlawful tax.

Defendants' third assignment of error is not well-taken.

In the fourth assignment of error, defendants maintain that the trial court erred in finding that the imposition of the ten percent fee on the decorators and not upon others who provided goods and services to exhibitors violated the Equal Protection Clause of the United States Constitution.

The referee found, at pages 7 and 8 of his report:

> Equal protection of the law requires that a reasonable grounds exist for making a distinction between those within and those outside a designated class. State ex rel. Industrial Commission (1983), 2 Ohio St.3d 173. Where the classification is not made upon a rational basis, for certain policy reasons, the distinction is a denial of equal protection. Allied Stores of Ohio v. Bowers (1959), 355 [sic] [358] U.S. 522.
>
> *8 In the case at hand, this referee finds that a general class of vendors, including plaintiffs,

> operate businesses at the Expositions Center. None of the other vendors, other than plaintiffs, are required to remit a portion of income to gain access to the fairgrounds. The defendants have not offered any rational basis to make this distinction. Hence, plaintiffs are arbitrarily treated differently as a class within the general class of vendors. This classification constitutes a denial of equal protection of the laws of this state.

As noted in Allied Stores of Ohio, Inc. v. Bowers (1959), 358 U.S. 522, 527:

> The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. . . . The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' . . . '[I]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' . . .

Since the commission is a state agency, its actions and regulatory conduct are subject to the restrictions imposed upon state action by the Equal Protection Clause of the Fourteenth Amendment to the United

States Constitution. See, also, Wheeling Steel Corp. v. Glander (1949), 337 U.S. 562.

The question is whether there is a rational basis for requiring from decorators ten percent of their gross revenues while not imposing such a fee on similarly situated individuals. Defendants' primary assertion is that the additional fees were imposed to recover damages caused by decorators. Mr. Foust, along with the assistant general manager, and the rental concessions manager, testified that they were unaware of any damages caused by the decorators to the Expositions Center. Moreover, as indicated above, no rational basis was provided for the arbitrary selection of the ten percent fee imposed upon the decorators. The only other reason given by Mr. Foust was that the fee was necessary to generate revenues. Thus, the fee constituted an unlawful tax. There is no plausible explanation provided why decorators were designated rather than other vendors similarly situated.

In sum, the referee's findings on this issue are correct as no rational basis has been shown for the discriminatory treatment applied to decorators.

The fourth assignment of error is not well-taken.

In the fifth assignment of error, defendants contend that the trial court erred in holding that the agreement violates the laws of this state and must be enjoined. Defendants do not present any new or additional

arguments that have not been addressed and rejected in the previous assignments of error.

The fifth assignment of error is not well-taken.

Defendants' assignments of error are overruled, and the judgments of the trial court are affirmed.

*9 Judgments affirmed.

McCORMAC, P.J., and STRAUSBAUGH, J., concur.

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the

whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

"EXHIBIT A"

CONCESSION AGREEMENT

BETWEEN

COLUMBUS MUNICIPAL AIRPORT AUTHORITY

(The "Authority")

and

[[[Concessionaire]]]

FOR THE

OPERATION OF A
RENTAL CAR CONCESSION
AT THE
PORT COLUMBUS INTERNATIONAL AIRPORT

Filed with
Complaint
3/28/98

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AGREEMENT
FOR THE OPERATION OF A
RENTAL CAR CONCESSION

This CONCESSION AGREEMENT ("Agreement") is made as of May 1, 1998 by and between Columbus Municipal Airport Authority ("Authority"), the operator of Port Columbus International Airport ("Airport"), and _____("Concessionaire"), a corporation organized under the laws of the State of _____ and authorized to do business in the State of Ohio.

1. TERM

1.1 Term

The term of this Agreement is for a period of ten (10) years beginning on May 1, 1998 (the "Effective Date"), and expiring at midnight on April 30, 2008.

1.2 Operating Period

The "Operating Period" shall be for the term of this Agreement, beginning on May 1, 1998 and expiring at midnight on April 30, 2008.

1.2.1 Interim Operating Period

The "Interim Operating Period" shall be the period from May 1, 1998 until the Date of Beneficial Occupancy for the Concessionaire in the Parking Structure. Bussing to and from the terminal will be permitted during the Interim Operating Period.

1.2.2 Primary Operating Period

The "Primary Operating Period" shall be the period from the Date of Beneficial Occupancy for the Concessionaire in the Parking Structure until midnight on April 30, 2008.

1.3 No Privilege of Renewal

There shall be no privilege of renewal hereunder except as specifically set forth in this Agreement. At the Authority's option, any holding over after the expiration of this Agreement by Concessionaire shall be from month to month which may be terminated at any time by the Authority or Concessionaire, giving thirty (30) days written notice to the other party. All activities during such holding over period shall be pursuant to the terms and conditions of this Agreement.

1.4 Date of Beneficial Occupancy

The Date of Beneficial Occupancy shall mean the date on which progress on the construction of the Parking Structure has advanced to such a stage that, in the written opinion of the Authority, it is sufficiently complete so that the Concessionaire awarded under this Agreement can be performed for the purposes for which it is intended. The Date of Beneficial Occupancy shall not be later than ninety (90) days after the Parking Structure has been turned over for the Concessionaire for tenant fit out.

1.5 Agreement Year

The term Agreement Year shall be the one-year period beginning 12:00 a.m. on May 1 until midnight on April 30 of the subsequent year. For example, the first Agreement Year shall begin at 12:00 a.m. on May 1, 1998 and end at midnight on April 30, 1999.

2. OPERATING AREAS

2.1 Operating Areas

2.1.1 Primary Operating Areas

The "Primary Operating Area" shall be the Rental Car Garage Facility at Port Columbus International Airport. The Primary Operating Area will be located in the parking structure ("Parking Structure") to be constructed west of the Airport terminal building and existing garage as designated on the drawings attached as Exhibit B, and includes the following elements: (1) office and check-in counter space in the Parking Structure (collectively, "Office Space"); (2) lobby and restrooms on Level 1 of the Parking Structure (collectively, "Common Area"); (3) the area adjacent to the Parking Structure for fueling and washing vehicles, and maneuvering and queuing vehicles for fueling and washing ("collectively, the "Quick Turnaround Area or QTA"); (4) the parking spaces (often referred to as ready-

return parking (spaces) on the first and second Levels of the Parking Structure ("Parking Spaces"); and (5) the stacking space outside the Parking Structure adjacent to the fuel islands within the QTA ("Stacking Space"). The Exhibit B attached to this Agreement when it is signed by the parties includes a preliminary plat of the Primary Operating Area that is subject to revision to reflect the final garage design and construction. The Authority will prepare final leasehold exhibits of the Primary Operating Area and Concessionaire's Operating Area after completion of construction of the Parking Structure and the allocation of space amongst the rental care concessionaires which shall become part of this Agreement by amendment and shall supersede the preliminary version attached hereto.

2.1.2 Interim Operating Area

Until the Date of Beneficial Occupancy for the Parking Structure, Concessionaire shall operate in the Interim Operating Area. The initial Interim Operating Area shall consist of the Baggage Claim Counter Area, the Ground Transportation Shuttle Areas designated by the Authority from time to time, and its Designated Service Facility. Concessionaire acknowledges that there will be considerable changes and disruptions due to construction during the Interim Operating Period, including periodic relocation of the Shuttle Area, and removal of the Baggage

Claim Counter Areas. The Authority will endeavor to the extent practicable to minimize the disruptions, but the Authority shall have no responsibility for disruptions of Concessionaire's operations or temporary interruptions of Concessionaire's use of any part of the Interim Operating Area due to construction activities by the Authority or the Authority's contractors.

2.1.3 Concessionaire's Operating Area

The "Concessionaire's Operating Area" shall be that portion of the Interim Operating Area during the Interim Operating Period and the Primary Operating Area during the Primary Operating Period specifically designated for or occupied by Concessionaire, along with any areas designated for common use by rental care concessionaires.

2.1.4 The areas identified in Section 2.1.1 through 2.1.3 shall collectively be known as the "Operating Area".

2.2 Designated Service Facility Concessionaire shall designate a facility for car maintenance and storage for all cars used as part of its airport rental care concession. Such facility shall be known as Concessionaire's Designated Service Facility. Any other facility which is used to accommodate Concessionaire's airport rental car concession shall also constitute a part of the Designated Service Facility Any other facility within two (2) miles of a Designated

Service Facility shall be presumed to be a part of the Designated Service Facility. All Gross Revenues generated at a Designated Service Facility shall constitute Gross Revenues covered by this Agreement.

2.3 Allocation of Parking Space The first level and a portion of the second level of the Parking Structure will be available to accommodate ready/return parking spaces (collectively, "Parking Space"). Subject to the minimum space allocations described below each rental care concessionaire will be required to rent its Market Share of Parking Space in the Rental Car Facilities. For planning purposes a preliminary Market Share allocation will be made at the time of execution of this Agreement based upon reported gross revenues from all companies reporting revenues to the Airport for the twelve month period ending December 31, 1997. Those companies not currently reporting revenue to the Airport for the twelve month period ending June 30, 1999. A concessionaire will not be assigned ready/return spaces on more than one level of the Parking Structure. The Authority shall provide written notice to Concessionaire of the number of ready/return spaces Concessionaire has been allocated under the provisions of this Agreement. The allocation, once made, shall be effective until the next allocation date (or the end of the Term of this Agreement if no subsequent allocation date).

2.3.1 Market Share

For purposes of this Agreement, Market Share shall mean the percentage that a concessionaire's Gross Revenues is of the total of all Gross Revenues for all rental car concessionaires, under this or similar concession agreements, for the period at issue. For allocations, see Exhibit A for the Market Share Chart. If there is any surplus space in the Operating Area following the Market Share space allocation, any company interested in renting additional space may request such additional space within ten (10) days after receipt of notice of the Market Share allocation. In the event there is insufficient space to meet such requests, surplus space will be allocated by the proportionate Market Share of the companies requesting such surplus space. The concessionaire's Market Share plus allocated surplus space is referred to as the Concessionaire's Allocated Share. For the preliminary market Share allocation used for initial planning and construction a concessionaire not operating at the Airport during 1997 may provide documentation as to market share at other airports in order to determine the probable Market Share for initial operations in the Rental Car Garage Facility.

2.3.2 Location of Concessionaire's Parking Space

The location of the Parking Space allocated to Concessionaire shall be determined by the Authority.

Allocation and reallocation shall be by "Zipper Count". For purposes of the Agreement, Zipper Count shall mean the allocation of Parking Spaces by a counting method with the counting started from either the northwest-most stall or the southwest-most stall, counting continuously along that row, back along the next row, then back along the third row, and so forth until that concessionaire's allocation has been made. The next concessionaire's space allocation shall start where the first ended and continue in the same fashion. Subsequent allocations shall start and count in the same manner where the preceding concessionaire's allocation finishes. The Authority may deviate from he foregoing method as necessary to maximize the overall efficiency of the rental car garage facilities. Notwithstanding the foregoing Zipper Count requirement, the Zipper Count shall be arranged to ensure that each concessionaire is allocated front row stalls.

2.3.3 Reallocation of Concessionaire's Parking Spaces

Parking Space assigned to Concessionaire shall be reallocated annually on march 1, beginning March 1, 2001. The annual reallocation shall be based on market share for the previous calendar year, with a minimum share of the Parking space accommodating parking for twenty (20) renal cars available to each Concessionaire. The re-allocated Parking Spaces shall be in the same general area

as the previously allocated Parking Spaces, except the Authority reserves the right to substantially change the location of Concessionaire's Parking Spaces in the event that any rental car concessionaire has had more than ten (10) percentage point change in its Market Share within a three (3) year period.

2.3.4 Striping Plan

An initial striping plan shall be developed by the Authority in consultation with the Rental Car Concessionaire's Working Group. All striping and restriping shall be performed by the Authority.

2.4 Counters and Office Space

2.4.1 Counter Space

Available check-in counter space shall be allocated initially based upon market Share. The allocated space shall include no less than sixteen (16) lineal feet of check-in counter space. A preliminary allocation shall be made within ninety (90) days after execution of this Agreement for the selection of general locations and planning purposes. A Market Share allocation will be made thirty (30) days prior to the construction of the counter area for the actual lineal feet of the counter space. The location of a concessionaire's counter space shall be based on selection by Concessionaires in the order of their Minimum Annual Guarantee. The highest bidder will choose its general

location of counter first; the second highest bidder will choose its general location next; other bidders will continue in order in the same manner until all on-airport rental car agencies have chosen a section of counter and there is no available counter remaining empty. The Authority reserves the right to make adjustments to selected counter space to ensure that all concessionaires receive their allocated share of lineal feet and no gaps of non-selected counter space separate any concessionaires. The Authority may reallocate the check-in counter space in the event that any rental car concessionaire's Market Share changes by more that ten (10) percentage points over a period of twelve (12) consecutive months.

2.4.2 Office Space

The Office Space available for use by all rental car concessionaires will be allocated based upon Market Share with the same width as the counter space allocated to Concessionaire. A preliminary allocation shall be made within ninety (90) days after execution of this Agreement for the selection of general locations and planning purposes. A Market Share allocation will be made thirty (30) days prior to the construction of the office space for the actual size of the office space. At the time of the allocation, concessionaires may agree to redistribute or exchange office space allocations, provided that all office space that the Authority has made available is rented by a

concessionaire. The Office Space allocated to a concessionaire shall be directly behind the counter space allocated to that concessionaire.

2.4.3 Parking Structure Common Area

Concessionaire shall have the use in common with other rental car concessionaires as a lobby area adjacent to the rental car counters. See Exhibit B for layout of common areas.

2.5 QTA

2.5.1 Stacking Space

The Stacking Space located adjacent to and west of the Fuel Island shall be allocated and billed among the rental car concessionaires based upon Market Share provided that no concessionaire shall be allocated fewer than six (6) stacking spaces. The Authority shall have the right to reallocate each rental car concessionaire's space annually on March 1 based on Concessionaire's Market Share for the previous calendar year. The location of the Stacking Space allocated to Concessionaire shall be determined by the Authority, but it shall in all cases be in the proximity of the Fuel Island assigned to Concessionaire.

2.5.2 Fuel Islands

The nine (9) Fuel Islands ("Fuel Area") shall be allocated by the Authority with each concessionaire entitled to the use of one Fuel Island, and additional Fuel Islands to those concessionaire with a market Share of

greater than twenty-five percent (25%). Concessionaire's with five percent (5%) or less market share may be required to share the fuel island assigned to them. The location of Concessionaire's Fuel Island(s) shall be determined by the Authority.

2.5.3 Wash and Vacuum Buildings

The nine (9) Wash and Vacuum Bays ("Wash Area") shall be allocated by the Authority with each concessionaire entitled to the use of at least one Wash and Vacuum Bay, and additional Wash and with a Market Share of greater than twenty-five percent (25%). Concessionaire's with a five percent (5%) or less market share may be required to share the wash and vacuum bay assigned to them. the Wash and Vacuum Bays(s) allocated to Concessionaire shall be adjacent to the Fuel Island(s) allocated to Concessionaire.

2.5.4 Common QTA Area

In addition to the foregoing allocated space, Concessionaire shall have the use of the remaining areas within the QTA in common with all other concessionaires under similar agreements with the Authority for maneuvering space("QTA Common Area").

2.5.5 Data of QTA Allocations

A preliminary Market Share allocation will be made within ninety (90) days after execution of this Agreement for planning purposes. Prior to the beginning of

operations in the Parking Structure, a market allocation shall be made by September 1, 1999 based on the Market Share for the twelve month period ending June 30, 1999. The Authority reserves the right to reallocate the Fuel Area and Wash Area in the event that any concessionaire's Market Sharer for a twelve month period as compared to the 1999 calendar has changed by more than ten (10) percentage points.

2.6 Condition of Concessionaire's Operating Area

The Concessionaire's Operating Area shall be provided to Concessionaire in the condition described in Section 2.1 and identified in Exhibit B. Concessionaire shall make the Capital Additions and install the equipment and personal property in the Concessionaire's Operating Area as required by this Agreement or as necessary for Concessionaire's operation of its rental car concession, and as approved by the Authority.

2.7 Adjustments to Rental Car Garage Facilities

The Authority may unilaterally change the Operating Areas identified in this Agreement from time to time, as deemed necessary by the Authority to further the efficient utilization of the Airport's facilities, including accommodation of Airport construction activities and operations, provided that the Authority shall give Concessionaire

commercially reasonable advance notice of each substantial and further provided that the Authority shall make a reasonable effort to minimize changes and to structure the changes that are made to minimize adverse impacts on Concessionaire's business, to the extent minimization is operationally and financially reasonable under the circumstances.

2.8 Adjustments to Allocations

If an audit reveals an error in the Gross Revenue of any concessionaire, the Authority, at its sole discretion, may reallocate or refuse to reallocate the Operating Areas based upon the calculation described above using the corrected Gross Revenue.

2.9 Use of the Operating Areas

Concessionaire may use the Operating Areas only for the purposes specifically established by this section.

2.9.1 Use by Other Concessionaires

The Parking Space allocated to Concessionaire shall be used only by Concessionaire, and no other concessionaires, without the prior written approval of the Authority. Any revenues to Concessionaire for the use of Concessionaire's allocated Parking Spaces shall belong to the Authority.

2.9.2 Short Term Gratis Parking

2.9.2.1 Interim Operating Period

Customers will be permitted to use the remote public parking lots along International Gateway during the Interim Operating Period for returning rented vehicles during the hours which Concessionaire is not required to be in operation under this Agreement, without Concessionaire being charged parking rates for such use, under the following condition: on the day in which the rented vehicle was returned to the Airport, Concessionaire must remove all such returned rental vehicles before 11:30 a.m. from the remote shuttle parking lots along International Gateway. Concessionaire agrees that in the event Concessionaire makes use of any public spaces in the Parking Structure which is not permitted under this Agreement, Concessionaire shall pay to the Authority the daily parking rate for each such day of unauthorized use.

2.9.2.2 Primary Operating Period

Customers will be permitted to use the public parking areas of the Parking Structure and remote public parking lots along International Gateway during the Primary Operating Period for returning rented vehicles during the hours which concessionaire is not required to be in operation under this Agreement, without Concessionaire being charged parking rates for such use, under the following condition: on the day in which the rented vehicle was returned to the Airport, Concessionaire must remove all such returned rental

vehicles before 8:00 a.m. from the Parking Structure and before 11:30 a.m. from the remote shuttle parking lots along International Gateway. Concessionaire agrees that in the event Concessionaire makes use of any public spaces in the Parking Structure which is not permitted under this Agreement, Concessionaire shall pay to the Authority the daily parking rate for each such day of unauthorized use.

2.9.3 Garage Signage

The spaces and any general leasehold signage shall be appropriately planned by the Concessionaire at its expense with such signs installed in a manner approved by the Authority, which approval shall not be unreasonably withheld or delayed. The signage shall conform with the Authority's sign standards developed with consultation from the Working Group, and must be approved in writing by the Authority.

2.9.4 Parking Structure Check-in Counter and Office Space

Concessionaire may use the Parking Structure check-in space for customer rental, return and related transactions approved by the Authority, and for an administrative office.

2.9.5 QTA

2.9.5.1 Use of QTA

Concessionaire shall utilize the QTA only for automobile fueling, washing, cleaning, light maintenance, fluid

replenishment, vacuuming, and related activities as are reasonably necessary for preparing its automobiles for rental pursuant to this Agreement. Concessionaire shall not utilize the QTA for heavy or extensive maintenance (including, but not limited to, oil changes) or for the storage of damaged vehicles. Such maintenance shall be conducted at the Concessionaire's Designated Service Facility. Further, the Concessionaire shall not allow its automobiles in the Fuel and Wash Areas prior to their return to the Concessionaire's Parking Spaces, but no other vehicle parking, including employee parking, shall otherwise be permitted in or about the Fuel and Wash areas.

2.9.5.2 Common Use of QTA

The Concessionaire hereby acknowledges that since the QTA is a joint use facility, and due to the nature of its operation, it is conceivable that damage, malfunction, or other occurrences involving another concessionaire's premises or equipment may adversely affect the operation or use of the Concessionaire's Premises. The Concessionaire shall conduct and coordinate its operations and activities with all other concessionaires, so as to avoid conflicts with other concessionaires and foster a safe and efficient operation for all tenants of the QTA. The Working Group will hold regular meetings to discuss operational issues with the respect to the QTA. Upon receiving written notice from either another concessionaire,

or from Concessionaire that another concessionaire is failing to coordinate its operations in and about the QTA with those of the Concessionaire, the Authority shall promptly investigate the matter and within five (5) business days of the conclusion of such investigation take such action as the Authority, at its sole discretion, may deem necessary or appropriate. However, the Authority shall not in any event be liable in any way to the Concessionaire for any damages suffered by reason of the activities of another concessionaire, by reason of the failure of another concessionaire to coordinate its operations with the Concessionaire's operation, by reason or the failure of another concessionaire to carry out the directions of the Authority, or by reason of another concessionaire's default int he performance of its obligations with regard to the QTA. However, in the event of repeated difficulties in coordination of operation, the Authority reserves the right to develop a schedule of liquidated damages to be imposed on Concessionaire for its failure to comply with this paragraph.

2.9.5.3 Signage in QTA

No signage or banners, other than corporate logo regulatory signage, or employee oriented or warning signs will be allowed within the QTA without the prior written permission of the Authority. Additional items placed in the QTA, such as vending machines, dumpsters, etc., must be approved from an aesthetics and visibility standpoint for placement in advance by the Authority. The Authority shall not withhold approval unreasonably.

2.9.5.4 Improvements and Refurbishment to the QTA

The Concessionaire may construct or install such additional fixtures to the QTA as are necessary to conduct the QTA operations described herein. The Conces-sionaire acknowledges and agrees that it shall be entitled to no reimbursement or buy-out from the Authority for any facilities or improvements installed by the Concessionaire during the Term of this Agreement. The Authority shall be responsible for periodic refurbishment of the QTA facilities to replace Authority owned equipment and facilities when such equipment and facilities are worn out or require replacement. Such refurbishment shall occur only after consultation with the Concessionaire and other concessionaires to ensure work does not unreasonably disrupt rental car operations. The cost of such refurbishment shall be included, along with interest, over the useful life of the improvement and included in the rate base at the commencement of each Agreement.

2.9.5.5 Surrender of QTA at the End of Term

The Concessionaire's right to occupy its assigned space within the QTA shall expire with the expiration or earlier termination of this Agreement. At the end of the Operating Period of this Agreement, the Concessionaire shall vacate its assigned space within the QTA under the provisions applicable to its surrender of the Premises, set forth in Section 16.8 herein. The Authority

shall have no obligation to officer the QTA, or any portion thereof, to the Concessionaire for its use during the Operating Period of a subsequent concession agreement. The Authority plans to continue to use the QTA beyond the expiration date of this Agreement for the purpose of a rental car concession. The terms and conditions of such use shall be set forth in a future Agreement. As provided in Section 18.7, the Authority shall have no buy-out payment obligations to the Concessionaire with respect to the Concessionaire's improvements to the QTA.

2.10 Rights of Third Party Ingress and Egress

Concessionaire's use of the Operating Areas is subject to reasonable concurrent ingress and egress by the Authority and its employees, contractors, and representatives, by the car-renting public, and by third parties for police, fire, safety, construction, maintenance, inspection, and other activities reasonably related to Airport business. Subject to the requirements of this Agreement, Con-cessionaire shall be responsible for regulating activities in the Operating Areas, other than activities by the Authority or the Authorities employees, contractors, or representatives. The Authority shall have no responsibility for regulating activities in the Operating Areas, other than its own activities and those of its employees, contractors, and representatives. Nothing in this subsection shall be deemed to interfere with the Authority's right to enforce the provisions of this Agreement, including but not limited to rules

adopted by the Authority. Nothing in this subsection shall be deemed to interfere with the Authority's ability to exercise its police powers.

2.11 Rights to Relocate

In addition to any other right of the Authority herein, the Authority may, at any time during the Operating Period of this Agreement and upon thirty (30) days prior written notice to the Concessionaire, require the Concessionaire to surrender all or any portion of the Premises in order to accommodate, under the Capital Development Program, a change in the design or use of the airport's facilities. In such event, the Authority shall in its reasonable discretion: (i.) provide the Concessionaire with substitute Premises which the Authority determines to be reasonably equivalent to the portion of the Premises surrendered and/or grant the Concessionaire an equitable reduction in the rental charges payable by the Concessionaire to the Authority hereunder, and (ii.) purchase from the Concessionaire any improvements installed by the Concessionaire with the written approval of the Authority within the portion of the Premises surrendered by the Concessionaire to the extent the Parties have reasonably determined that such items cannot be moved to the substitute area. In the event the Concessionaire is required, under the terms of this Section 2.11, to move a portion or surrender all of the Premises, all costs of the physical move shall be borne by the Authority and the substitute area

provided by the Authority to the Concessionaire in lieu of the portion of the Premises surrendered will be finished out by the Authority, at the Authority's expense, so that such substitute area will be reasonably equivalent in quality and finish to the portion of the Premises surrendered.

3. OPERATING RIGHTS, PRIVILEGES AND OBLIGATIONS OF CONCESSIONAIRE

3.1 Concessions Rights Granted

The Authority hereby grants to the Con-cessionaire the right, privilege and obligation to conduct and operate a high-quality, well-managed, and efficiently run car rental concession at the Airport, during the period of this Agreement and from the Premises assigned to it. This grant shall include the right, privilege and obligation to service and maintain only passenger-type rental vehicles; to dispense fuel (expressly limited to vehicles used in the airport rental car business of the Concessionaire); to rent and check in airport rental vehicles, including the right to offer for sale related loss and collision damage waiver protection, personal injury and accident insurance, supplemental liability, uninsured motorist, and personal effects insurance; and to provide customer service features including but not limited to baby car seats and cellular phones rented along with vehicles. Any additional

rights shall be approved by the Authority in writing prior to implementation by the Concessionaire, and provided that: (i.) such rights must be of a type that customarily are offered for sale or rent at other major airport car rental facilities, and (ii.) such rights must not conflict with a concession right or privilege of another Airport concessionaire. All rights and privileges not specifically granted to the Concessionaire in this Agreement shall be reserved to the Authority.

3.2 Interim Shuttle Bus Operations

Concessionaire shall have the right to engage in customer shuttle bus operations between the terminal and Concessionaire's Designated Service Facility until the Concessionaire's Beneficial Occupancy of the Rental Car Garage Facilities as provided herein.

3.3 Concessionaire's Covenants Regarding Use of the Premises

In the conduct of its business, Concessionaire covenants and agrees to restrict its activities on the Premises for the purpose specified in this Agreement. Concessionaire shall not at any time vacate the Premises or use the Premises for any other purpose without the prior written consent of the Authority. Concessionaire may rent from the Premises any passenger motor vehicle, including vans, sport

utility vehicles and station wagons. The terms "passenger motor vehicle", "automobile", and "car" shall not include trucks, pickups, motorcycles, and large special purpose vehicles. the vehicle height restriction on level 2 of the Parking Structure for motor vehicles is seven feet, zero inches (7'0").

3.4 Promotions

Except for its corporate signage approved in advance by the Authority, and except as otherwise authorized by the Authority in writing, Concessionaire shall not permit any signs, brochures, racks, promotional materials or similar items to be displayed or placed on counters within the Premises. Concessionaire may provide a sign at its flexible stanchions for informing its customers of particular information; however such sign must first be approved by the Authority. Concessionaire may also request Authority approval to utilize an overhead signing system above the Counter Space to provide information to its customers.

3.5 Used Car Sales

Concessionaire may sell cars at their Designated Service Facility, provided that no signage advertising the sale of used cars at the Designated Service Facility shall be posted on the Concessionaire's Operational Area or Designated Service Facility; no cars shall have paint on any part

of a car that in any way relates to the sale of used cars; and all sale information posted in any car window will be limited to one 8 1/2 inch by 11 inch sheet of paper. Ten percent (10%) of all proceeds from the sale of used cars at Concessionaire's Designated Service Facility shall be included in Gross Revenues.

3.6 Other Business Concessions

3.6.1 Limit on Other Concessions by Concessionaire

Concessionaire must have the Authority's prior written consent before engaging in any concession not expressly and specifically permitted by this Agreement, including but not limited to the sale of food, beverages, maps or newspapers, and may be required as a condition of that consent to pay the Authority a fee, which may include, but is not necessarily limited to, a percentage of gross revenue from the concession.

3.6.2 Authority's Right to Install and Operate Other Concessions

The Authority reserves the right to provide, through its concessionaire(s), for the installation and operation of coin-operated vending machines, public telephones or similar equipment on those portions of the Premises, including the Lobby adjacent to the Counter Space, and sidewalks and vertical circulation cores within

the Parking Structure that are accessible by the public, without the prior written approval of Concessionaire. Concessionaire may provide vending services in its office space and allocated portion of the QTA.

3.6.3 Limits on Advertising

Concessionaire expressly acknowledges that the Authority maintains separate exclusive advertising concessions for the dissemination of local and national advertising on the Premises. Concessionaire warrants that it shall not engage in any conduct which may conflict with such other concessions and further agrees that it shall not publish or distribute in any manner any advertising or magazine on the Premises herein; in any automobile ready/return lot that it may maintain in conjunction with its operations on the Premises; or in any automobiles leased to passengers that use the facilities on the Premises, except for magazines and other promotional material consisting solely of in-house promotional materials confined strictly to Concessionaire's products and that does not contain any advertising or promotional messages for any other person, whether or not Concessionaire receives any consideration from such person for disseminating such advertising or promotional messages.

3.7 Rights of Ingress ad Egress

Concessionaire shall have the right of ingress to and

walkways and roadways. Concessionaire shall have the right to use common use roadways. Concessionaire's rights of ingress and egress and use of common use roadways shall be subject to all applicable laws and to regulations established by the Authority's Executive Director.

3.8 Other Rental Car Concessions

The concession rights and privileges granted by this Agreement are no exclusive. The Authority may grant similar rental car concession rights to others, and by entering into this Agreement, Concessionaire acknowledges that the Authority is entering into similar agreements with other Concessionaires for similar services under similar terms. In the event that any concession agreement contains any provision more favorable to such concessionaire than the terms herein granted, then at the option of the Authority this Agreement shall be amended to include such more favorable terms.

3.9 Operating Obligations/Standards for Service

3.9.1 Car Rentals

Concessionaire shall operate a rental car concession continuously during the term of this Agreement, and shall operate is in a first class manner to serve passengers and other users.

3.9.2 Adequate Numbers of Cars

Concessionaire shall maintain on hand at the

Airport an adequate number of cars to meet all commercially and reasonably foreseeable demands of the traveling public. The model year of the cars shall not be more than two (2) years older than the current model year. All cars shall be maintained in good and safe operating order, free from any known mechanical defects, and shall be kept clean, neat and attractive inside and out. Concessionaire may offer for rental antique, vintage, classic or other luxury or prestige automobiles or handicapped operated vehicles which are of good quality, free from any known defect and clean and attractive both inside and out. The Authority may disapprove any car provided by Concessionaire for public use at the Airport if the car fails to comply with the requirements of this Agreement. Upon receipt of the Authority's written notice of disapproval with a statement of grounds, Concessionaire shall immediately withdraw the disapproved cars from use as rentals at this Airport and shall not return the car to rental use at the Airport until the grounds for disapproval have been eliminated to the Authority's satisfaction.

3.9.3 Hours of Operation

Concessionaire shall provide car rental services at the customer check-in counter in the Airport Parking Structure seven days per week, beginning at least one hour before the first scheduled departure and for at least on hour after the last arrival for which any customer

has reservations for a car rental from Concessionaire. The Authority's Executive Director or the Director's designee, in his or her sole discretion and upon Concessionaire's written request, may authorize deviations from the requirements of this Agreement.

3.9.4 Credit and Reservations

Concessionaire shall accept at least three (3) nationally recognized credit cards for payment of automobile rentals; and provide for a national reservation system for services of Concessionaire at the Airport.

- 3.9.5 Information Regarding Fees and Charges

Concessionaire shall not misrepresent to the public its prices or the terms and provisions of its rental agreements or those of its competitors. Concessionaire shall comply with all applicable rules and regulations of the Federal Trade Commission and all other governmental agencies. Concessionaire shall fully inform each customer, prior to the execution of such customer's rental agreement, of all fees and charges applicable to such customer's rental. If the Authority determines, after notice and opportunity for Concessionaire to comment, that any of Concessionaire's business practices are unreasonable, deceptive or unconscionable, Concessionaire shall immediately cease such practices upon receipt of a written order to do so from the Authority. The Authority will give advance notice to

Concessionaire that the Authority considers a certain practice to be unlawful or discriminatory and Concessionaire shall have an opportunity to respond to the allegation.

3.9.6 Orderly Premises

Concessionaire shall at all times maintain Concessionaire's Operating Area and all fixed improvements and other personal property located on Concessionaire's Operating Area in a safe, clean, orderly, attractive and first-class condition satisfactory to the Authority. Any sign or other item on the Operating Areas which the Authority deems to be offensive to the public shall, upon notice from the Authority, be promptly and permanently removed from the Operating Areas by Concessionaire. Concessionaire shall not permit any nuisance, waste or injury to be committed on the Concessionaire's Operating Area.

3.9.7 Quality of Service

Concessionaire shall furnish prompt, courteous, and efficient service on a fair, reasonable and nondiscriminatory basis to any member of the public. Concessionaire shall keep concessionaire's Operating Area in a safe, clean, orderly and inviting condition. All services and property rented by Concessionaire must conform in all respects to federal, state, county and municipal laws, ordinances, and regulations, and to any applicable rules

adopted by the Authority's Executive Director. Concessionaire shall conduct its operation in an orderly and proper manner and so as not to annoy, disturb or be offensive to customers, patrons or other tenants at the Airport.

3.9.8 Manager

Throughout the period of this Agreement, Concessionaire shall engage a full-time rental car concession manager who: (i.) is active, qualified and experienced; (ii.) has full authority to control the day to day operations of the car rental concession at the Airport; and (iii.) has authority to respond to emergencies, including the clean up of a Hazardous Substance Release in a timely and appropriate manner. The manager or the manager's designee shall be stationed at the Airport and shall be present at the Airport during regular business hours. In the manager's absence, a qualified subordinate shall be present at the Airport to assume and be directly responsible for carrying out the duties of such manager.

3.9.9 Staff

Concessionaire shall maintain a sufficient number of trained personnel to insure that : (i.) Concessionaire's customers will receive prompt and courteous service at all times, and (ii.) vehicle maintenance, car handling, and office and administrative duties are preformed in the efficient and effective manner.

3.9.10 Staff Conduct

Concessionaire shall be responsible for the conduct, demeanor, and appearance of its officers, agents, employees and representatives. Employees on duty shall wear uniforms or other suitable business attire. Uniforms shall be kept neat, orderly, and clean. Customer service personnel and attendants shall be trained by Concessionaire to render high quality, courteous, and efficient service. Concessionaire shall closely supervise service personnel to assure a high standard of service to rental car concession customers. Upon receipt of a written objection from the Executive Director or the Director's designee concerning the conduct or demeanor of any of Concessionaire's employees, Concessionaire shall promptly eliminate the bases for the objection, including if necessary the initiation of steps that could lead to the discharge of the offending employee in accordance with Concessionaire's employment policies and any applicable collective bargaining agreements, and shall take any action reasonably necessary to prevent a recurrence of the same or similar conduct or demeanor.

3.9.11 Solicitation prohibited

Concessionaire shall not permit its agents or employees to use pressure sales tactics or to overtly solicit for car rentals or related services offered by

Concessionaire under this Agreement. The Authority shall be the sole judge of whether conduct amounts to a violation of this subsection. Upon written notice from the Authority, Concessionaire shall take all necessary steps to eliminate conduct in violation of this subsection and to prevent its recurrence.

3.9.12 Customer Complaints

In the even Concessionaire receives (or the Authority receives and forwards to concessionaire) any written complaint concerning Concessionaire's operation of the Concession, Concessionaire shall promptly respond to such complaint in writing within thirty (30) days of its receipt and make a good-faith attempt to explain, resolve or rectify the cause of such complaint. Without further notice or demand, Concessionaire shall keep a copy of each such complaint and Concessionaire's written response for a period of one (1) year from the date of the complaint and shall make the complaint and the written response available to the Authority upon its request.

3.9.13 Authority's Shopping Service

The Authority shall have the right, at any time and without limitation, to monitor and test the quality and effectiveness of concessionaire's services and credit card/cash-handling procedures through the use of a professional shopping service employed by the Authority. In the event such shopping service determines either that the

level of Concessionaire's service is below that required in the provisions of this Agreement, or the goods and services or prices offered by concessionaire are being misrepresented, Concessionaire shall take corrective action, subject to the approval of the Executive Director or the Director's designee.

3.9.14 Relationship with Competitors

Concessionaire shall maintain cooperative, albeit competitive, relationships with its competitors at the Airport, and shall not engage in open, notorious, or public disputes, disagreements, or conflicts with competitors that would tend to interfere with quality of the rental car concessions at the Airport or in any way reflect poorly on the services provided to the public at the Airport.

3.9.15 Fueling Procedures

Concessionaire shall establish, and provide upon the request of the Authority, written operating procedures for review and approval by the Authority covering the receipt, storage and dispensing of automobile fuel. These written operating procedures shall include, but not be limited to, the installation, maintenance, safety checks, and safety procedures applicable to storage and dispensing equipment. Said procedures and equipment shall comply with the applicable laws, rules, regulations and standards of the federal, state, and local governmental bodies, including the Authority, having jurisdiction over said fuel and fuel dispensing procedures, equipment, or facilities.

3.9.16 Diversion of Customers Prohibited

Concessionaire shall not divert, or allow the diversion of, any prospective rental car concession customers from the Airport to another location. If any such diversion does occur, the diverted transaction shall be deemed to have occurred at the concessionaire's Counter Space or Designated Service Facility.

3.9.17 Loading and Unloading Requirements

All rental car concessionaires shall cease bussing operations to their Designated Service Facilities when the occupancy of the Rental Car Garage Facilities occurs. Each time Concessionaire picks up or drops off a customer other than shuttle bus operations during the Interim Operating Period, other than a physically challenged customer, or delivers or picks up a rental car for other than a physically challenged customer, on or near any of the curbsides and roadways located between the Parking Structure and the Terminal Building, Concessionaire shall pay the Authority a Rental Car Loading Fee of seven dollars ($7.00). Concessionaire shall pay monthly all Rental Car Loading Fees incurred during the preceding month.

3.9.18 Compliance with Rules

In addition to complying with the requirements of this Agreement and with all applicable federal, state and local laws, rules, and regulations,

including but not limited to the requirements of the Americans with Disabilities Act, Concessionaire shall comply with reasonable rules adopted by the Authority or by the Authority's Executive Director, or the Executive Director's disignee, regarding the use of, entry on, and access to the Authority's property.

4. FEES AND FINANCIAL REPORTING

4.1 Fees

4.1.1 Fees

In addition to any other payments required under this Agreement, Concessionaire shall pay all of the following fees to the Authority:

4.1.1.1 An annual "Privilege Fee" for equal to the greater of the applicable Minimum Annual Guarantee ("MAG:) or nine and one quarter percent (9.25%) of Concessionaire's Gross Revenue for the Agreement Year in question. The Privilege Fee shall be paid in monthly installments which shall be the greater of one twelfth (1/12) of the applicable Minimum Annual Guarantee or nine and one quarter (9.25%) percent of Concessionaire's Gross Revenue for the month.

4.1.1.2 A Monthly installment of eighty dollars ($80) for each Parking Space allocated to Concessionaire.

4.1.1.3 A monthly installment on an annual fee calculated at the rate of one dollar and thirty cents ($1.30) per square foot for Concessionaire's Allocated Share of the QTA.

4.1.1.4 A monthly installment of four hundred seventy-three dollars and forty-two cents ($473.42) on an annual fee equal to $5,681.00 for each Wash Bay allocated to Concessionaire. If Concessionaire is sharing a Wash Bay with another concessionaire under this agreement, Concessionaire will pay its prorata share of the monthly installment, as calculated between concessionaires sharing the Wash Bay.

4.1.1.5 A monthly installment on an annual fee of forty-nine dollars ($49) per square foot based upon concessionaire's Allocated Share of office and counter space.

4.1.1.6 A monthly payment for all Rental Car Loading Fees, as defined in Section 3.9.18, incurred by Concessionaire during the preceding month.

4.1.2 The Phrase "Garage Space Rent" shall mean the monthly installments due by the Concessionaire under this Agreement for Parking Space (Sub-Paragraph 4.1.1.2), QTA space (Sub-Paragraph 4.1.1.3), Wash Bay rent (Sub-Paragraph 4.1.1.4) and office and counter space (Sub-Paragraph 4.1.1.5).

4.1.3 Fee Adjustment

The fee required for Garage Space Rent will be adjusted down if the actual construction costs included in the $12.3 million estimate are less than the estimated amount. j The total fee required for Garage Space Rent will not be increased with respect to any amount by which actual construction costs for tenant improvements exceed the estimate unless changes to the design of the Parking Structure and QTA are made at the request of a majority of Concessionaires. A "majority of Concessionaires" will exist if the sum of their Market Shares exceeds fifty percent (50%) of the total rental car concession market under this and concession agreements of other concessionaires with the Authority.

4.1.4 Minimum Annual Guarantee

For the first Agreement Year the Minimum Annual Guarantee shall be the amount bid by Concessionaire as the first year Minimum Annual Guarantee. For each subsequent Agreement Year, the Minimum Annual Guarantee shall equal to eighty-five percent (85%) of Concessionaire's Privilege Fee for the immediately preceding Agreement Year, but in no event shall the Minimum Annual Guarantee for any Agreement Year be less than the Minimum Annual Guarantee bid by Concessionaire for the first Agreement Year.

4.1.5 Abatement

As long as Concessionaire is not in default in any of the terms and conditions contained in this Agreement, the Minimum Annual Guarantee set for in Paragraph 4.1.4 shall be abated on a monthly passengers deplaning on scheduled airline flights at the Airport shall decline twenty-five percent (25%) or more as compared to the equivalent month of the previous year. During any period of abatement, Concessionaire shall be relieved from its obligation to satisfy the Minimum Annual Guarantee, but instead shall pay to the Authority the Privilege Fee as defined herein, as well as Garage Space Rent and all other applicable fees and charges set forth in this Agreement. Said abatement shall be in effect for each month that the aforesaid conditions shall continue to exist. Before any such abatement shall be authorized, Concessionaire shall submit proof and substantiation of such reductions and the causes thereof to the Authority's Executive Director, or his designee, so that he may properly determine whether such abatement is necessary and not attributable to the conditions within the control of concessionaire and its managers, agents or employees.

4.2 Gross Revenue

4.2.1 Definition of Gross Revenues

Gross Revenue means the total amount charged by Concessionaire during an Agreement Year

including any separately stated fees, surcharges and other charges, in connection with : (i.) Concessionaire's Rental Car Business under this Agreement; (ii.) any activities related directly or indirectly to that business; and (iii.) any other business of Concessionaire in the Operating Areas, in concessionaire's Designated Service Facility, or elsewhere at the Airport.

4.2.2 Concessionaire's Rental Car Business

Concessionaire's Rental Car Business shall include, but is not limited to, the rental or short-term leasing of cars and related transactions at the Airport (including Concessionaire's Designated Service Facility) or to Airport users, or the delivery of which occurs at the Airport or rental cars returned to the Airport, regardless of the ownership, area, fleet, or location assignment of the cars, and regardless of where payment is made or where the cars are returned. For example, if a car originally rented at the Airport is exchanged for another car at another of Concessionaire's locations, the entire transaction, including any revenue received for the second car, shall be included in Gross Revenue. For the purposes of this Agreement, "rental of cars" includes, but is not limited to, time and mileage charges, LDW/CDW, fueling, charges for personal accident insurance and other insurance, cellular phones, child restraints, and all other transactions and charges of whatever nature, including but not limited to any fees,

surcharges and all other charges, arising from or incidental to Concessionaire's rental car concession under this Agreement unless expressly excluded by this Agreement.

4.2.3 Exclusions from Gross Revenues

The following transactions and charges are specifically excluded from "Gross Revenue".

4.2.3.1 Local Traffic

Fifty percent (50%) of the Gross Revenue from each of Concessionaire's transactions with a Local Customer occurring at Concessionaire's Designed Service Facility. For purposes of this Agreement, a Local Customer is a customer residing within the Columbus Metropolitan Statistical Area (MSA) as documented by a driver's license showing an address n the columbus MSA.

4.2.3.2 Sales Tax

Sales or similar taxes or fees imposed by federal, state, county, or municipal law which are separately stated to and paid by the customer and which are payable directly to the taxing authority by Concessionaire. No deduction from Gross Revenues shall be allowed for such items including franchise taxes, taxes levied on concessionaire's activities, facilities, equipment, or real or personal property, payroll taxes, or other various operating costs;

4.2.3.3 Returns of Rentals from Other Airports

Rentals which are returns of automobiles originally rented at another airport, if Concessionaire or an affiliate paid a privilege or concession fee on such rental transaction to the originating airport.

4.2.3.4 Recovery of Damages

Sums received from customers or insurance carriers for damage, loss or conversion of concessionaire's cars, provided that such amount is no greater than the actual cost of repair or replacement. This exclusion does not include any sums received by concessionaire in lieu of rent for those cars;

4.2.3.5 Sales Proceeds

Proceeds from the disposal of personal property of the Concessionaire used by concessionaire in the operation of Concessionaire's Rental Car Business; and

4.2.3.6 Discounts

Corporate or volume rebates where concessionaire can establish for each corporate or volume customer; (i.) the amount of the rebate; (ii.) that the customer has a contractual right to the rebate; and (iii.) that the amount Concessionaire claims as an exclusion from Gross Revenue is attributable to rental car transactions at the Airport by that corporate or volume customer. Gross

Revenue may not be reduced by volume discounts unless the discount is documented to each transaction and the documentation is submitted with concessionaire's monthly report.

4.2.3.7 Long-Term Leases

Revenues generated from Long-Term Leases between Concessionaire and customers. For purposes of this Agreement, "Long-Term Lease" shall mean a contract between concessionaire and a customer for a period of at least six (6) months.

4.2.4 Express Exclusions

Unless revenues from Concessionaire's Rental Car Business is expressly and particularly excluded from "Gross Revenue" under this Agreement, such revenues shall be included in gross Revenue. Revenues that my be derived from sources similar but not identical to those described herein shall be included in Gross Revenue unless expressly excluded by this agreement.

4.3 Bad Debts

Concessionaire shall have the right to conduct all or a part of its business on a credit basis; provided, however, that the risk of such operation shall be borne solely by Concessionaire, and Concessionaire shall include in Gross Revenues any charge the company customarily makes for goods and services even though Concessionaire fails to actually collect such a charge.

4.4 Responsibility for Taxes

Concessionaire shall pay all taxes, including any sales or use taxes, license, certification, permit or examination fees and excises which may be assessed, levied, exacted or imposed by any governmental authorities having jurisdiction, on Concessionaire's personal property, operations, Gross Revenues, income, Concessionaire's Operating Areas including concessionaire's Parking Space or any Fixed Improvements to concessionaire's Operating Area or on this Agreement and the fees payable hereunder, or on the rights or privileges granted to concessionaire by this Agreement. Concessionaire shall make and file all applications, reports and returns required in connection with any such taxes or fees. Concessionaire shall have the right to protest such taxes in accordance with the procedures of the applicable jurisdiction. With respect to property taxes on the Rental Car Garage Facility, the Authority shall invoice Concessionaire for its prorata share of such taxes bases on the percentage of leased rental car space occupied by Concessionaire. Concessionaire shall pay such amount to the Authority as part of it next monthly payment to the Authority.

4.5 No Diversion

The intentional diversion, through direct or indirect means, of rental car revenues from the inclusion in Gross

Revenues, as defined in this Agreement, is prohibited. Diversion shall include, but not be limited to, the following situations: Shortage of rental cars at the Airport while having rental cars available elsewhere in the Columbus Metropolitan Area, renting such cars to a potential customer that arrived at the Airport and not including the resulting rental car revenue in the Gross revenues defined under the Agreement; and the taking of a reservation, advising or suggesting to a potential customer arriving at the Airport that the customer rent a car at a location other than the Airport regardless of the reason, and not including the rental car revenue resulting from such transaction in Gross Revenues. In addition to all other remedies available by law, the Authority shall have the right to immediately terminate this Agreement upon a determination by the Authority's Executive Director that Concessionaire has intentionally diverted revenues as described herein.

4.6 Advertising and Customer Bills

4.6.1 Concessionaire acknowledges that the payments by Concessionaire to the Authority under this Agreement are for Concessionaire's use of facilities at the Airport, and that none of those payments reflects a fee that is imposed by the Authority upon customers renting cars from Concessionaire. Concessionaire understands that the Authority does not support the practice of transferring

Concessionaire's obligation for payment of the Privilege Fee due herein to its customers. However, Authority understands the Garage Space Rent will be a substantial increase over the prior rent for the concessionaire's service facility. Therefore, the Authority does not require but will not prohibit the separate statement of a Garage Recoupment Surcharge on the terms and conditions specified herein. Nothing in this Agreement shall be deemed to permit Concessionaire to charge its customers a separate amount to allow Concessionaire to recover the Privilege Fee, Garage Space Rent or any portion thereof directly from the customer.

4.6.2 Garage Recoupment Surcharge

Concessionaire is permitted, but not required, to collect a Garage Recoupment Surcharge only under the following terms and conditions:

1. Such surcharge is titled "Garage Recoupment Surcharge";
2. There is no reference to the Airport or the Authority and there is no statement or inference in writing or orally that the fee is imposed by the Airport or the Authority;
3. Such surcharge shall be immediately adjacent to Concessionaire's time and mileage

charge on the customer's invoice;

4. If the Concessionaire elects to charge a Garage Recoupment Surcharge, concessionaire complies with FTC requirements with respect to this charge and notifies the customer of the surcharge at the time of reservation and again at the time of execution of the contract; and

5. The amount of the surcharge per rental car transaction does not exceed the applicable Annual Garage Recoupment as described below.

4.6.3 Annual Garage Recoupment

On or before the Date of Beneficial Occupancy and on or before each March 1 thereafter, the Authority shall calculate the Annual Garage Recoupment in accordance with the following formula:

1. Subtract the 1999 Total On-Airport Rental Car Concession Revenues from the prior calendar year's Total On-Airport Rental Car Concession Revenues (the "Incremental Concession Revenues");

2. Subtract three percent of the Incremental concession Revenues from the Total Rental Car Garage Facility Rent (total Garage Space Rent but no including the Privilege Fee) charges to all concessionaires under concession agreement similar to this Agreement (the "Adjusted Total Rent");

3. Divide the Total Adjusted Rent by the Total Rental Car Transactions for all On-Airport Concessionaires to the Authority for the prior calendar year.

4. The resulting quotient shall be the maximum Annual Garage Recoupment for the following Agreement Year.

4.6.4 Concessionaire shall prominently post, in an area easily read by customers before they sign a rental agreement, a statement of gasoline prices charges by concessionaire if a customer returns a car without a full tank of gas. If Concessionaire charges for gasoline at different rates, depending upon the customer's election among alternative plans concessionaire shall display all the rates and shall include in the display a legible and easily read explanation of when each rate applies.

4.7 Monthly Statements

4.7.1 General Requirements

Along with payment of the Privilege Fee, Concessionaire shall submit an itemized Certified Statement to the Authority in such form and detail which the Authority may reasonably request, including a level of detail equivalent to Concessionaire's own general ledger delineations which: (i.) sets forth Concessionaire's entire Gross Revenues for the prior calendar month or adjustments to Gross Revenues; (ii.) separately identifies any exclusions from Gross Revenues as provided herein; (iii.) identifies the amount of any Garage Recoupment Surcharge collected; (iv.) lists the number of rental transactions, rental transaction days and average rental price occurring during the calendar month; and (v.) is signed by an authorized official of Concessionaire. In addition, each month the Concessionaire shall provide the Authority with a computer text file that details monthly sales information by contract number. These items shall be submitted to the Authority by Concessionaire on or before the 20th day of each calendar month, even if no Privilege Fee is due for the preceding month.

4.7.2 Liquidated Damages

The parties recognize that the Authority will incur additional administrative costs if Concessionaire is late

in providing the monthly statements required by this section and that the amount of those costs is difficult to determine with certainty. Consequently, the parties agree that Concessionaire shall pay the Authority one hundred dollars ($100) as liquidated damages each time Concessionaire is more than ten (10) calendar days late in submitting the monthly statement required by this section.

4.8 Annual Statement

4.8.1 Annual Statement

Sixty (60) calendar days after the end of each Agreement Year, the Authority shall undertake an audit of Gross Revenues. The costs of such audits shall be done by the Authority unless the results of such audits reveal an underpayment as described in Section 4.11, or if circumstances arise whereby Concessionaire causes the auditor to incur excess costs due to lack of timely preparation for the audit or a lack of appropriate attention during the course of the audit. The Authority shall issue its audit report (Annual Statement) within sixty (60) days from the start of the audit. The Annual Statement shall reflect a reconciliation of reported Gross Revenues with those reflected in the Concessionaire's Books and Records. If the Annual Statement discloses the Concessionaire owes additional amounts to the Authority, Concessionaire shall pay those amounts in accordance with Section 4.1. If the Annual

Statement discloses that a refund is due to Concessionaire, credit for the amount shall be taken against the next Monthly Statement, unless the term of the agreement has expired and such amount shall be refunded by the Authority to Concessionaire within thirty (30) calendar days after completion of the audit by the Authority.

4.9 Payments

4.9.1 Monthly Payment

By the first day of each month during the term of this Agreement, Concessionaire shall pay to the Authority in advance one-twelfth (1/12th) of the applicable Minimum Annual Guarantee, plus the monthly Garage Space Rent and all other fees due monthly under this Agreement.

4.9.2 Payment of Excess

By the twentieth (20th) day of each month during the term of this Agreement, and of the month following the expiration or termination of this Agreement, Concessionaire shall pay to the Authority any amount by which the monthly installment of the Privilege Fee for the preceding month exceeds one-twelfth (1/12th) of the Minimum Annual Guarantee.

4.9.3 Annual Adjustment

An adjustment ("Annual Adjustment") shall be made at the end of each Agreement Year so that

Concessionaire's payment for the Agreement Year is the greater of the Minimum Annual Guarantee for that year or nine and one quarter percent (9.25%) of Concessionaire's Gross revenue for that year. any credit to which Concessionaire is entitled as a result of the adjustment shall be credited in accordance with Paragraph 4.8.1.

4.9.4 Method of Payment

All payment due under this Agreement shall be payable to the "Columbus Municipal Airport Authority" and forwarded to:

Columbus Municipal Airport Authority
P.O. Box 360476
Columbus, Ohio 43236-0476

All payments must be accompanied by a statement setting forth the purpose and the period for which payment is being made. Concessionaire shall make payments due under this Agreement automatically, including but not limited to interest accrued on late payments. Payments under this Agreement shall be by wire, draft, or check on a bank authorized to engage in banking in the United States and shall be payable in U.S. dollars. Payments shall be made without abatement, offset, or deductions.

4.9.5 Interest Rate, Penalties and Late Charges

Without waiving any other right of action

available to the Authority in the event of default in payment of charges and fees hereunder, if Concessionaire fails to make a payment when due and said failure continues for a consecutive period of ten (10) calendar days, late charges will be assessed. Late charges may consist of interest and penalties. Thereafter, late charges will be assessed for each additional thirty (30) day period or portion thereof that the payment is late. The Interest Rate shall be at the rate per annum which is four percent (4%) higher than the prime rate as published in The Wall Street Journal. For purposes of this section, the prime rate will be measured on April 1st and October 1st of each calendar year during the term of the Agreement. The prime rate on April 1st or October 1st will be used to determine interest, penalties and late charges for the subsequent six (6) month period until the next day for determining the prime rate under this provision arises. In addition to interest, monthly late penalty charges at the rate of six percent (6%) per annum (or as established periodically) of the amount due will be assessed on the unpaid portion of accounts more than ninety (90) days past due.

4.10 Books and Records of Concessionaire

4.10.1 Maintenance of Accounting Records

Concessionaire shall maintain adequate accounting records in accordance with generally accepted accounting principles, generally accepted auditing standards

and the requirements of this Agreement, for: (i.) all transactions relevant to this Agreement (collectively, "Books and Records"); and (ii.) all exclusions from Gross Revenue claimed by Concessionaire. Concessionaire shall cause to be installed on Concessionaire's Operating Area, and shall at all times use, such cash registers, invoicing machines, sales slips and other accounting equipment, devises and firms as are reasonably necessary to record properly, accurately and completely all sales at the Airport of Concessionaire's Gross Revenues.

4.10.2 Books and Records

Books and records shall include detailed analysis listing all of Concessionaire's operations at the Airport in the form of printed, written or electronic media. The rental contract forms shall be sequentially numbered in a series designated for use only with this Concession Agreement. Books and records shall also include, but is not limited to: (i.) all original accounting source documents detailing transactions relevant to this Agreement (collectively, "Records"), including but not limited to (A.) original rental contacts, (B.) operating/financial statements, (C.) a complete (cumulative) general ledger, (D.) monthly sales journals detailing each rental transaction for a month, (E.) reconciliations between the financial records and monthly reports submitted to the Authority, (F.) bank statements applicable to the operation of this Concession at

the Airport, (G.) corporate trial balances, (H.) corporate contracts with corporate customers, (I.) annual audited financial statements and related reports on internal controls (including management representation letters), (J.) electronic media documenting accounting records, and (K.) other sales related documents; and (ii.) all exclusions from Gross Revenue claimed by Concessionaire. For exclusions or adjustments to Gross Revenue, the Records shall include, but are not limited to: (i.) all agreements between Concessionaire and corporate or volume customers establishing the customers' contractual rights to rebates; (ii.) lists of all individual rental transactions with all corporate or volume customers; (ii.) all individual rental agreements with all corporate or volume customers; and (iv.) and documentation or records supporting additional reductions to Gross Revenue.

4.10.3 Computer Records

In those situations where Concessionaire's records have been generated from computerized date (whether mainframe, minicomputer, or PC-BASED computer systems), Concessionaire agrees to provide the Authority's representative with extracts of date files in a computer readable format on data disks, E-mail with attached files or suitable alternative computer date exchange formats.

4.10.4 Cooperation by Concessionaire

Concessionaire shall provide the name and telephone number or Concessionaire's accounting manager or the like who has a thorough knowledge of the accounting system as it pertains to this Agreement and who will assist the Authority with its audit. Concessionaire will also allow interviews of past and present employees who were involved in the financial or operational activities of Concessionaire.

4.10.5 Maintenance of Records

Concessionaire shall keep all records identified in Section 4.10 for at least five (5) years after the end of the applicable Agreement Year, or in the event of a claim by the Authority, until such claim of Authority has been fully ascertained, fixed and paid. The records requirements of this section shall also extend to any of Concessionaire's subsidiaries, partners, joint venturers, and sub-concessionaires or the like.

4.11 Audits

4.11.1 Audit Findings

The Authority shall have the right to authorize one or more audits of concessionaire's records pertaining to any of its operations at the Airport. If either an annual audit or an audit performed by the Authority discloses an under reporting of Gross Revenue,

Concessionaire shall pay to Authority any amounts due under this Agreement within fifteen (15) calendar days of written notice by the Authority, plus interest calculated in accordance with Paragraph 4.9.5. If an audit conducted by the Authority or at the Authority's expense discloses an under reporting of Gross Revenue by two percent (2.0%) or more for any twelve (12) month period, Concessionaire shall reimburse the Athetoid for the full cost of the audit, interest calculated in accordance with Paragraph 4.9.5, any applicable legal fees as explained below, and shall pay a one time penalty of ten percent (10.0%) of the under reported Privilege Fee. If an audit conducted by the Authority or at the Authority's expenses discloses an under reporting Gross Revenue by ten percent (10.0%) or more for any twelve (12) month period, Concessionaire shall reimburse the Authority for the full cost of the audit, interest calculated in accordance with Paragraph 4.9.5, and any applicable legal fees as explained below, and shall pay a one time penalty of fifty percent (50.0%) of the under reported Privilege Fee. If an audit conducted by the Authority or at the Authority's expenses discloses an under reporting Gross Revenue by twenty-five percent (25.0%) or more for any twelve (12) month period, Concessionaire shall reimburse the Authority for the full cost of the audit, interest calculated in accordance with paragraph 4.9.5, any applicable legal fees as explained below, and shall pay a

one time penalty of fifty percent (50.0%) of the under reported Privilege Fee and the Authority reserves the right to terminate this agreement. The Authority's rights under this subsection shall be in addition to any other rights or remedies the Authority may have.

4.11.2 Legal Fees

In the event that the Authority deems it necessary to utilize the services of internal or external legal counsel in connection with collecting the reimbursement for an audit, then Concessionaire shall reimburse the Authority for reasonable attorney's fees and litigation expenses as part of the aforementioned costs incurred.

4.11.3 Provision of Audit Workspace

Concessionaire agrees to provide appropriate work space to conduct the audit and free access to copiers, fax machines and other needed office equipment. Concessionaire will also make the requested original books and records available within ten (10) working days from the date of request by the Authority or the Authority's representative and will freely lend its own assistance in conducting the audit. If Concessionaire does not make the books and records available within ten (10) working days, a charge of one hundred dollars ($100.00) per day for each day the records are late will be applied against Concessionaire's performance guarantee, regardless of form. If such books and records are maintained outside the City of Columbus

and cannot be provided locally, Concessionaire agrees to reimburse the Authority for expenses incurred in sending representatives to wherever such records are maintained. Such expenses will include transportation, lodging, food and other out-of-pocket expenses resulting from the necessity to leave Columbus.

4.11.4 Survival of Concessionaire's Duties and Authority's Rights

The Concessions's duty to maintain books and records and the Authority's rights under this Agreement to inspect and audit the books and records of Concessionaire shall survive the expiration or earlier termination of this Agreement.

5. CONCESSIONAIRE'S OTHER OBLIGATIONS.

5.1 Concessionaire's Shuttle Bus Service

During the Interim Operating Period, Concessionaire shall provide, at its cost and expense, a shuttle bus service to transport rental car customers between the Terminal Buildings and Concessionaire's Designated Service Facility. Concessionaire shall maintain all shuttle bus vehicles in good operating condition. Concessionaire shall immediately remove from service and repair or have repaired any vehicle that is damaged or has a defect that would affect the safety of passengers or other. Concessionaire shall maintain and

keep in good operating condition the air conditioning and heating units within the shuttle bus vehicles. All buses operated by Concessionaire shall be titled and licensed in the State of Ohio and shall be subject to all local, State, and Federal inspection requirements of the State of Ohio. Concessionaire shall comply at all times with the shuttle bus routes and loading and unloading zones specified in writing by the Authority. Concessionaire agrees to regulate and control the frequency and curbside dwell time of its shuttle bus vehicles in accordance with any reasonable instructions which may be issued by the Authority.

5.2 Capital Additions by Concessionaire

5.2.1 Duty to Provide and Maintain

Concessionaire shall provide and maintain at its own expense all equipment, trade fixtures, tenant fixtures, signage and furnishings to Concessionaire's Operating Area as necessary for the effective and efficient operation of a rental car concession.

5.3 Plans and Specifications; compliance with law; Authority Approval

5.3.1 Authority Approval of Capital Additions

No fixtures, improvements or installations by Concessionaire shall be made, removed, demolished or relocated in the Operating Area without the Authority's prior written approval, which shall not be unreasonably

withheld. The Authority may require plans and specifications and the issuance of a permit from the Authority. All fixtures, improvements and installations shall conform to the Authority's design criteria and architectural requirements of Authority.

5.3.2 Compliance with laws and Building Codes

Concessionaire shall ensure that all additions, improvements, equipment, furnishings, fixtures and tenant finishes constructed or installed by concessionaire, or Concessionaire's concessionaire, conform in all respects to applicable federal, state, and local laws, rules, and building codes; the Authority's approval shall not be construed as a representation or warranty of conformance. The Authority may withhold approval based upon, among other grounds, engineering, architectural, or aesthetic considerations.

5.4 Compliance

5.4.1 Compliance with laws

Concessionaire shall comply with all Authority, county, state and federal laws, ordinances, regulations and orders governing or regulating the Airport and the Operating Area, its use by Concessionaire, and the operation of its concession hereunder.

5.4.2 Licenses

Concessionaire shall, at its own cost and

expense, procure and keep in force during the Operating Period of this Agreement, any and all necessary licenses, registrations, certificates, and permits.

5.4.3 Environmental Regulations

Concessionaire shall comply with all provisions of Authority, Airport, local, state, and federal environmental orders, regulations and statutes applicable to Concessionaire's operations.

5.4.4 Traffic Violations

Concessionaire shall pay for or cause it's employees to pay all traffic violation notices issued by Airport Police to Concessionaire's vehicles while such vehicles are under the control or operation of Concessionaire's employees.

5.4.5 Cooperation with Successor Operator of Automobile Rental Car Concession Upon the expiration or earlier termination of this Agreement Concessionaire agrees to cooperate fully with the Authority and with any and all successor concessionaires to ensure a smooth transition from concessionaire to such successor.

5.5 Maintenance of the Premises

5.5.1 Concessionaire shall be responsible, at its own cost and expense, for maintaining all of Concessionaire's Operating Area and all counter space,

personal property and equipment on Concessionaire's Operating area whether owned by the Authority or Concessionaire. Concessionaire shall maintain Concessionaire's Operating Area in a safe, clean, orderly and attractive condition and in good working order at the times during the Operating Period of the Agreement, obsolescence, acts of God and ordinary wear and tear excepted. Concessionaire further agrees that in the event that it does not maintain Concessionaire in writing of Concessionaire's failure to do so, and if Concessionaire has not taken steps to correct the condition within fourteen (14) calendar days after receipt of such written notice, the Authority may perform such maintenance or have it done by others at Concessionaire's expense, and Concessionaire agrees to pay promptly all billing for such services, plus fifteen percent (15%) thereof for administrative overhead.

5.5.2 Maintenance: Except for the maintenance obligations which are undertaken by the Authority pursuant to the terms of this Agreement, including the roof, walls and structural maintenance of the Parking Structure and QTA, Concessionaire shall perform necessary maintenance for its Parking Spaces, Office and Counter Area and QTA. Such maintenance shall include, but not be limited to : (i.) cleaning and sweeping its Parking Spaces, Counter and Office area and QTA area within Concessionaire's Operating Area; (ii.) relamping

electrical fixtures within Concessionaire's Operating Area within the QTA; and (iii.) maintaining all wash and associated equipment and fuel dispensers and other equipment installed by Concessionaire. Concessionaire, along with all other concessionaires, shall have the collective responsibility to provide and pay for rodent and pest control services, as well as all repairs, non-structural maintenance and seeping within the common areas of the Parking Structure and QTA Operating Area.

5.5.3 Janitorial costs for concessionaire's Operating Area and Common Area: In addition to maintenance responsibilities required of Concessionaire under Paragraph 5.5.1 and elsewhere in this Agreement, concessionaire shall be responsible for the provision and cost of janitorial services for all areas within concessionaire's Operating Area. Janitorial costs in the shared Common Areas, including the QTA, Ready/Return Area, Office and counter Space and all sidewalk adjacent to lobby entrances and exits, and any additional common areas, shall be allocated among rental car concessionaires in proportion to their relative market Shares.

5.5.4 Quality

All maintenance and repairs shall be of first-class quality in both materials and workmanship, and shall comply with all applicable federal, state and local laws, rules and codes.

5.5.5 Remedies

If Concessionaire fails to undertake maintenance, repairs, or replacements required under this Agreement, the Authority may give Concessionaire written notice of the failure. If concessionaire fails to undertake the maintenance, repairs, or replacements described in the notice within a time that is reasonable under the circumstances, but in no event longer than thirty (30) calendar days after receiving the notice, the Authority may perform the work and recover the cost of performance from concessionaire. The cost of the Authority's performance shall include direct costs and overhead. The Authority's remedy under this subsection is in addition to any other remedies the Authority may have under this Agreement or otherwise. If concessionaire's failure to undertake maintenance, repairs, or replacements is a material breach of this Agreement, the Authority's exercise of its remedy under this subsection shall not preclude the Authority from exercising remedies for concessionaire's default.

5.6 Collection and Removal of Refuse

5.6.1 Sole Responsibility of Concessionaire

Removal of refuse from Concessionaire's Operating Area is the sole responsibility of concessionaire. Concessionaire shall provide a complete and proper

arrangement for the adequate sanitary handling of all trash, garbage and other refuse caused as a result of the operation of Concessionaire's rental car concession. Concessionaire shall provide and use suitable receptacles for all garbage, trash and other refuse on or in connection with the use of its counter space and QTA area. The piling of boxes, cartons, barrels or other similar items in or in view of a public area shall not be permitted. Concessionaire shall keep Concessionaire's Operating Area reasonably clean, neat and orderly at all times.

5.6.2 Prohibition Against Interference

Concessionaire shall not do or permit to be done anything at or about the Airport that may interfere with the effectiveness or accessibility of the drainage and sewage systems, fire hydrants and hoses, heat, air-conditioning, elevators, electrical systems, and plumbing installed or located on or within the Operating Area or on the Airport. At the Parking Structure and the QTA, Concessionaire shall report any malfunction of the drainage and sewage systems, fire protection system, sprinkler system, alarm system, fire hydrants and hoses, heat and air-conditioning systems, electrical systems, and plumbing installed or located on or within the Operating Area to the Authority in accordance with Airport rules, regulations, and instructions and orders as soon as discovered.

5.6.3 Liquidated Damages

If Concessionaire allows dust or debris to be generated or accumulated on or in concessionaire's Operating Area without prompt clean-up, to the extent they may be blown about within the Operating Area or blown from the Operating Area to other parts of the Airport, concessionaire shall pay to the Authority fifty dollars ($50.00) in the first instance in an Agreement Year, one hundred and fifty dollars ($150.00) in the second instance, and five hundred dollars ($500.00) in each instance thereafter in the same Agreement Year. In addition, Concessionaire shall reimburse the Authority for any costs incurred by the Authority to remove or suppress the dust or debris.

5.7 Utilities

5.7.1 Ready/Return Spaces

The Authority shall meter, separately by parking garage level, electricity provided in the Parking Facility. The Authority shall pay monthly service charges for normal electrical use. The Authority will then bill each Concessionaire for its prorated amount of each monthly service charge based on its Market Share.

5.7.2 Office and Counter Area

The Authority shall meter electrical use in the office and counter areas. The Authority shall pay monthly service charges for normal office and counter area

use, other than telephone service, by Concessionaire in the Counter and Office Areas. the Authority will then bill each concessionaire for its prorated amount of each monthly service charge based on its Market Share.

5.7.3 Quick Turn Around

The Authority shall separately meter utilities in the QTA at the sole cost of concessionaires and concessionaire shall be responsible for making prompt payment of any charges for sanitary sewer, storm sewer, water, gas, electricity, telephone, including any and all connection fees and impervious surface fees charges by the governmental entity having jurisdiction, and all other charges for utilities which may be furnished to the QTA at the request of the Concessionaire.

5.8 Hazard, Potential Hazard, Nuisance, or Annoyance

Concessionaire shall correct at its own cost and expense any hazardous or potentially hazardous condition, nuisance, or annoyance immediately upon receipt of oral or written notice from the Authority's Executive Director, or the Executive Director's designee. The Authority's Executive Director, or the Executive Director's designee, may order the closure of the Operating Area until the corrective action is complete.

5.9 Security

The Authority provides law enforcement for the Airport, however, the first priority for the Airport Police shall be for airline-passenger related operations. Concessionaire may provide whatever additional security it may wish at its own cost, provided that the additional security is subject to disapproval by the Authority's director of Public Safety. Security provided by concessionaire shall be subject to the authority of the Airport police officers, and shall in no way hinder or interfere with the duties of those officers.

5.10 Deliveries

All deliveries to Concessionaire in the Operating Area, or otherwise at or about the terminal, will be in a manner and location approved by Authority.

5.11 Disadvantaged Business Enterprises

5.11.1 Future Compliance

The Authority is authorized by 49 USC Appx 2210 (h)(3)(b) to require car rental firms to purchase or lease goods and services from disadvantaged business enterprises as soon as the U.S. Department of Transportation Federal Aviation Administration (FAA) adopts a final rule that defines "small business concern" for the purposes of the purchase or lease of cars from DBEs. As

soon as the FAA adopts the necessary rule, the Authority will give Concessionaire written notice of the rule. After receipt of that notice, concessionaire shall comply with all applicable requirements of the rule and shall make a good faith effort to purchase or lease goods and services from DBEs so that the total amount paid for those goods and services after the date of the notice equals at least ten percent (10%) of Concessionaire's Gross Revenues realized after that date. Because the precise requirements of the relevant rule, as finally adopted by the U.S. Department of Transportation, are unknown at the time this Agreement is executed, the Authority reserves the right to unilaterally amend the foregoing DBE goal within a reasonable time after the final rule is adopted and in the reasonable exercise of the Authority's sole discretion in light of the availability of DBEs and the requirements of the final rule. The DBEs must be certified by the Ohio Department of Transportation or the Authority.

5.11.2 Discrimination Prohibited

This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23, Subpart F. Concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in the connection with the award or performance of any concession agreement covered by 49 CFR Part 23, Subpart F.

6. RIGHT TO ENTER

6.1 Right to Enter

The Authority shall have the right to enter Concessionaire's Operating Area to:

6.1.1 Conduct Inspections

The Authority's Contracting Supervisor and the Authority's Facilities manager, and their authorized representatives and agents, shall have the right to view any and all of Concessionaire's Operating Area hereunder at any reasonable time during normal business hours for the purpose of inspecting or maintaining Concessionaire's Operating Area or of doing any other act therein which may be necessary for the proper operation off the Airport. In performing such inspections, the Authority's Contracting Supervisor and the Authority's Facilities manager, and their authorized representatives and agents, will exercise their best efforts not to interfere with Concessionaire's use of Concessionaire's Operating Area.

6.1.2 Perform Any of Concessionaire's Obligations

Perform any of concessionaire's obligations under this Agreement that Concessionaire has failed to perform after reasonable notice to do so, including but not limited to maintenance, repairs, and replacements in Concessionaire's Operating Area, and recover cost of performance from Concessionaire:

6.1.3 Police

Exercise Authority's police power, and

6.1.4 Emergency

Respond as appropriate to any emergency.

7. OBLIGATIONS OF THE AUTHORITY

7.1 Authority's Maintenance Obligation

7.1.1 Generally

The Authority shall, either itself or through a third party maintenance contractor, maintain the roof and structural members of the Parking Structure and QTA; relamp Parking Structure and common area lighting; provide snow removal and deicing for the common use roadways and public and employee walkway; maintain common roadways/ramps, curbs and gutters, expansion joints, and the common use entrance and exit ramps to the rental car facilities, including performing paving and asphalt work; and perform necessary structural maintenance and preventive repairs to the Parking Structure, QTA and terminal buildings. For purposes of this Agreement such maintenance and repairs shall not include repairs to any Operating Facilities installed by the Authority or Concessionaire where the damage was caused by Concessionaire or concessionaires, and further provided that

Concessionaire shall reimburse the Authority within fourteen (14) calendar days of receipt of written demand for such reimbursement of the cost of intentional acts of Concessionaire, its officers, partners, employees, agents, contractors, subcontractors, licensees or invitees.

7.1.2 Structural Maintenance

"Structural maintenance" shall mean the painting, rehabilitation and keeping in good repair of the building foundations, roof and exterior walls of the Operating Area and all maintenance and repairs to correct any defects, patent or otherwise, in the building structures. Concessionaire shall give the Authority's Facilities Manager written notice describing any structural maintenance repair which is the responsibility of the Authority and the maintenance or repair process shall be commenced by the Authority promptly after its receipt of such written notices if the Authority agrees that such maintenance or repair is required and is the Authority's responsibility hereunder.

7.1.3 Authority Right to Interrupt

The Authority reserves the right to interrupt temporarily the heating, air conditioning, steam, plumbing, and electrical services when necessary to make repairs, alterations, replacements, or improvements in said systems. The Authority shall have no responsibility or liability for failure to supply heat, steam, air-conditioning, plumbing, and electrical service during any such period, or when

reveneted from doing so by laws, orders, or regulations of any federal, state, or local agency, as a result of strikes, accidents, or by any other cause whatsoever beyond the Authority's control. The Authority shall endeavor to provide advance notice of Concessionaire of such interruptions of utility services, and to coordinate said interruptions with Concessionaire's local manager so as to not unreasonably impact Concessionaire's business operations, if possible.

7.1.4 Authority Inspection of the Parking Structure

At least annually during the Operating Period of this Agreement, the Authority shall inspect the Parking Structure, including counter area nd QTA facilities, to determine if such facilities are in working order. The Authority shall forward a report to Concessionaire which determines whether such facilities are in acceptable working order and in good repair, reasonable wear and tear excepted. Those facilities requiring repair shall be undertaken by Concessionaire within a thirty (30) calendar day period from the date of receipt of notification by the Authority. A follow-up inspection to ascertain such repair or refurbishment shall be conducted by the Authority within sixty (60) calendar days following notification to Concessionaire by the Authority.

7.2 Administration of the Agreement

In order to assure the effective administration and enforcement of the terms and conditions of the Agreement, the Authority's Contracting Supervisor, or the Contracting Supervisor's representative or agent, shall be the party responsible for the on-site administration and enforcement of the terms and conditions of this Agreement in all areas unless the Agreement specifically provides that other Authority offices are responsible; provided, however, that such individual does not have the authority to issue orders or instructions to Concessionaire which would change any of the terms or conditions of this Agreement.

7.3 Authority's Right to Repair or Alter Facilities

7.3.1 Repairs and Alteration of Facilities

Notwithstanding any other provision contained in this Agreement, the Authority, or its designated agent, shall have the absolute right to maintain and to make any repairs, alterations and additions to the Operating Area, as well as the right to enter the Operating Area for the purpose of doing so, free from any and all liability to concessionaire for any loss of business or damages sustained by Concessionaire as a result of the Authority's making any such repairs, alterations or additions. If the Authority negligently or intentionally damages Concessionaire's

Operating Area while making any repairs, alterations and additions, the Authority shall repair or compensate Concessionaire for such damage, provided that immediate documentation of such damage and its cause is provided to the Authority's Contracting Supervisor. The Authority shall endeavor to provide advance notice to Concessionaire of such repairs, alterations, and additions.

7.3.2 Construction Disruption

The Authority shall have no responsibility for disruptions of Concessionaire's operations or temporary interruptions of concessionaire's use of any part of the Operating Area due to construction, repair or alteration activities by the Authority or the Authority's Contractors.

8. COORDINATION OF OPERATION

8.1 Concessionaire and Industry Coordination

The Authority shall coordinate the further development of rental car ready/return facilities on the Airport with Concessionaire and others in the rental car industry throughout the interim Operating Period of this Agreement. The Authority shall establish a Working Group consisting of representatives from each of the rental car concessionaires at the Airport which will meet periodically as necessary to review Authority plans for future permanent rental car facilities and operations, parking practices, car

movement, QTA operating procedures, and security and safety procedures, as well as continue throughout the Agreement to address other issues of mutual interest. The Authority may also include off-Airport or other industry rental car companies in such meetings as appropriate. Notwithstanding such coordination, the Authority retains the right to make the final decision on all facility development. As the development of the Airport's Master Plan continues, additional rental cr facilities may ultimately be located in another area of the Airport.

8.2 Transition Plan

Concessionaire, in conjunction with the Authority and other concessionaires, shall develop a transition plan to be used in making the transition from Concessionaire's Interim Operating Area to Concessionaire's Primary Operating Area. Such transition shall be completed on or before the Day of Beneficial Use.

8.3 Meetings

The Working Group shall hold monthly meetings during the Interim Operating Period and the first year of the Primary Operating Period. Thereafter, the Working Group shall hold meetings at least quarterly for the remainder of the term.

8.4 Signs

Concessionaire shall have the right to install and maintain appropriate graphics and identifying signs on the Concessionaire's Operating Area, provided that the type, size, design, content, color, location, installation, and shall be consistent with the graphic and sign standards as determined by the Authority with consultation from the Working Group, and approved in writing by the Authority. Concessionaire shall obtain the prior written approval of the Authority before installation of all signs. Such approval by the Authority shall no be unreasonably withheld. Concessionaire shall remove all signs and sign hardware upon expiration or termination of this Agreement and restore each sign location to its former state, unless the Authority elects to retain all or any portion of the signage, in which case Authority will compensate concessionaire for the mutually agreed upon value of the retained signage.

9. INDEMNIFICATION, INSURANCE AND FINANCIAL SECURITY

9.1 Indemnification

Concessionaire shall defend, indemnify and hold the Authority and its directors, officers, employees, and agents completely harmless from and against any and all claims, suits, demands, actions, liabilities, losses, damages,

judgments, or fines arising by reason of injury or death of any person, or damage to any property including all reasonable costs for investigation and defense thereof (including, but not limited to, attorney fees, court costs and expert fees) of any nature whatsoever arising out of Concessionaire's activities on the Airport under this Agreement, or in its use or occupancy of the Operating Area, regardless of where the injury, death or damage may occur, except to the extent such injury, death or damage is caused by the negligent act or omission or willful misconduct of the Authority and its directors, officer, employees, agents and contractors. The Authority shall give to Concessionaire reasonable notice of, and an opportunity to defend against, any such claims or actions, and the Authority shall take reasonable actions to mitigate its damages.

9.2 Notice from Concessionaire

Notwithstanding the above indemnification, concessionaire shall give the Authority notice of any matter covered herein and shall forward to the Authority every demand, notice, summons, or other process received in any claim or legal proceeding covered hereby.

9.3.1 Required Insurance

Concessionaire shall, at its sole cost and expense, maintain, in force and in effect, throughout the

period of the Contact, a policy or policies of insurance, with a reputable insurance company authorized to conduct business in the State of Ohio having a rating of A- or higher from A.M. Best Company or an equivalent rating. Insurance shall be provided in the minimum amounts as set forth below:

9.3.1.1 Workers' Compensation Insurance as required by the laws of the State of Ohio

9.3.1.2 Commercial General Liability insurance with a Combined Single Limit for bodily injury and property damage of not less than Two Million Dollars ($2,000,000) per occurrence. Coverage must include Broad Form Contractual, Property Damage, Personal Injury, Operating Areas-Operations, Products-Completed Operations, Independent contractors and Subcontractors, and Fire Legal liability, sudden & accidental pollution coverage. Such policy or policies shall, to the degree reasonably possible, be issued on an occurrence basis, and shall cover the all of the Operating Area, and all activities of Concessionaire on the Operating Area or the Airport and all indemnifications made in the Agreement.

9.3.1.3 Comprehensive Automobile Liability Insurance for bodily injury and property damage with a Combined Single Limit of One Million Dollars ($1,000,000) for each accident for all automotive equipment owned, operated, leased, hired, or non-owned, covering use,

loading and unloading, provided that nothing herein is intended to make Concessionaire's coverage primary over coverage by Concessionaire's customers or to remove liability by Concessionaire's customers pursuant to the rental contract.

9.3.1.4 Property Insurance with "All Risk" coverage at replacement cost for Concessionaire's Leased and Personal Property.

9.3.2 Additional Requirements

9.3.2.1 Said policy or policies of insurance shall contain a provision that written notice of cancellation, alteration, or any material change thereof shall be delivered to the Authority not less than thirty (30) days in advance of the effective date thereof and with the Authority's prior written consent unless equivalent policies are then issued and available.

9.3.2.2 All policies, except Workers' Compensation and Employer's Liability, shall identify the Columbus Municipal Airport Authority as an additional insured in a manner satisfactory to the Authority. Said policy shall cover only claims arising from events addressed in the Agreement.

9.3.2.3 If, in the Authority's opinion, the minimum limits of the insurance herein required have become inadequate during the period of the Agreement, Concessionaire agrees that it will increase such minimum

limits by reasonable amounts on request of the Authority provided that said coverage is available at commercially reasonable rates.

9.3.2.4 Concessionaire shall deliver each certificate of required coverage to the Authority for approval.

9.3.2.5 In the event that Concessionaire shall at any time fail to provide the insurance required under this Section 9.3, the Authority may, at its option, immediately terminate this Agreement or purchase such coverage with the cost of such purchase to be reimbursed by the Concessionaire.

9.3.3 Self-Insurance

Notwithstanding anything to the contrary in this Agreement, the Authority will allow the insurance coverage required by this Section to be provided through a self-insurance plan established by Concessionaire, provided that the self-insurance plan may consist of a combination of primary, excess umbrella insurance and a self -insured retention, and the total of insurance and self-insurance protection is no less than the limits stated in this Article. The self-insurance plan must be approved in writing by the Authority prior to becoming effective at the Airport. A concessionaire requesting the Authority's approval of a self-insurance plan must submit a copy of its self-insurance plan, current financial statements showing the limits of its

established self-insurance retention and proff of the primary and excess umbrella insurance. The Authority shall have thirty (30) days to review the proposed self-insurance plan. If the self-insurance plan is approved by the Authority and becomes effective, Concessionaire shall not increase the retention levels stated in the self-insurance plan approved by the Authority without the approval of the Authority.

9.4 Financial Security

9.4.1 Payment Guarantee

On the Effective Date of this Agreement, Concessionaire shall provide the Authority with security to guarantee the payment of amounts that may become due under this Agreement whether in the form of Privilege Fee, Garage Space Rent or reimbursements or damages to the Authority (the "Payment Guarantee"). The amount of the Payment Guarantee shall be fifty percent (50%) of the Minimum Annual Guarantee changes pursuant to this Agreement.

9.4.2 Form of Security

The security shall be in the form of a performance bond not to exceed fifty percent (50%) of the required Payment Guarantee. The remaining fifty percent (50%) of the required Payment Guarantee shall be provided in the form of a cash deposit (cash, cashier's check, certificate of deposit, or U.S. Treasury Obligation) or an

irrevocable letter of credit drawn on a bank doing banking business in Ohio. The security shall be in a form that is consistent with requirements of this section for draws by the Authority in the even Concessionaire remains delinquent after ten (10) days written notice in paying any amount due under this Agreement.

9.4.3 Authority Draw and Concessionaire Replenishment

The Authority may draw upon the security provided pursuant to this section to satisfy a delinquency under this Agreement that remains uncured after ten (10) calendar days written notice to Concessionaire. If the Authority draws upon the security, Concessionaire shall replenish the security to the original amount within fourteen (14) calendar days after notice of the Authority's draw.

9.4.4 Failure of Concessionaire to Provide Security

If Concessionaire fails to provide or maintain the security guarantee in effect at any time during the period of the Agreement, Concessionaire shall be in default an the Agreement may be terminated by the Authority.

10. DAMAGE OR DESTRUCTION OF THE OPERATING AREA

10.1 Partial Damage

If all or a portion of the Operating Area is partially damaged by fire, explosion, the elements, the public enemy, or other casualty, but not rendered untenantable, the same, except for any Capital Additions made by Concessionaire, will be repaired with due diligence by the Authority at its own cost and expense, and the abatement of rent shall be proportionate to the impact of the damaged area on the Concessionaire's operations; provided, however, that if the damage is caused by the act or omission of Concessionaire, its sublesses, agents, or employees, and to the extent that such damage is not covered by insurance, Concessionaire shall be responsible for reimbursing the Authority for the cost and expenses incurred in such repair, including rent abatements. Concessionaire shall be responsible for repairing its Capital Additions at Concessionaire's own expense.

10.2 Extensive Damage

If the damages referred to in Section 10.1 shall be so extensive as to render the Operating Area untenantable, but capable of being repaired in thirty (30) days, the same shall be repaired with due diligence by the Authority at its

own cost and expense, and an appropriate portion of the Garage Space Rent and Minimum Annual Guarantee shall abate from the time of such damage until such time as the Operating Area is fully restored and certified by the Authority's Engineers as ready for occupancy; provided, however, that if said damage is caused by the act or omission of concessionaire, its sublessees, agents, or employees, the applicable rentals and fees shall not abate and to the extent that such damage or destruction is not covered by insurance, Concessionaire shall be responsible for reimbursing the Authority for the cost and expense incurred in such repair.

10.3 Complete Destruction

10.3.1 Generally

In the event the Operating Area is completely destroyed by fire, explosion, the elements, public enemy or other casualty or so damaged that they are untenantable and cannot be replaced except after more than thirty (30) days, the Authority shall undertake the repair, replacement, and reconstruction of the Operating Area; and all or a portion of the Garage Space Rent and Minimum Annual Guarantee payable under this Agreement shall abate as of the time of such damage or destruction and shall henceforth cease until such time as said Operating Area are fully restored certified by the Authority's Engineers as ready for occupancy;

provided, however, that if said damage is caused by the act or omission of Concessionaire, its sublessees, agents or employees, the said fees and charges will not abate and to the extent that such damage or destruction is not covered by insurance, Concessionaire shall be responsible for reimbursing the Authority for the costs and expenses incurred in said repair including abated rent of other concessionaires; provided further, however, if within two (2) months after the time of such damage or destruction the Authority determines said Operating Area shall not have been repaired, or if the parties sooner agree that the Operating Area cannot be made tenable within twelve (12) months, Concessionaire may give the Authority written notice of its intention to cancel this Agreement in its entirety.

10.3.2 Act or Omission of Concessionaire

Notwithstanding the foregoing, if said Operating Area is completely destroyed as a result of the act or omission of Concessionaire, rentals and fees shall not abate and the Authority may, in its discretion, require Concessionaire to repair and reconstruct said Operating Area within twelve (12) months of such destruction and pay the costs therefor; or the Authority may repair and reconstruct the Operating Area within (12) months of such destruction and Concessionaire shall be responsible for reimbursing the Authority for the costs and expenses incurred in such repair, including abated rents.

10.4 Limits of the Authority's Obligations Defined

It is understood that, in the application of the foregoing Sections 10.1, 10.2 and 10.3, the Authority's obligations shall be limited to repair and reconstruction of the Terminal Building, Parking Structure and QTA to substantially its condition prior to the damage, and shall not exceed the amount of insurance proceeds available to the Authority for repairs. Notwithstanding any other provision of this Article, the Authority may decline to make repairs upon determining that demolition and reconstruction is in the Authority's best interest, in which case the Authority may terminate this Agreement by written notice to Concessionaire.

10.5 Damage to Concessionaire's Capital Additions and Improvements

Concessionaire shall repair at its own expense, whether covered by insurance or not and notwithstanding any waiver of subrogation, any of Concessionaire's Capital Additions or improvements that may be damaged during the term of this Agreement. If Concessionaire fails to repair Concessionaire's damaged Capital Additions or improvements interfere with the efficient and effective provision of rental car services, the Authority may make the repairs and recover the cost of the repairs from Concessionaire, including the Authority's overhead.

10.6 No Duty to Protect

The Authority shall have no duty to protect or insure against loss of Concessionaire's Capital Additions or improvements or property in the Operating Area by fire or otherwise, unless such loss of Concessionaire's Capital Additions or improvements or property in the Operating is due to the negligent act or omission of the Authority or its agents or employees.

11. INSURANCE AND RESTORATION OBLIGATIONS OF THE AUTHORITY

11.1 Insurance

The Authority shall insure, and at all times keep insured, the Parking Structure and QTA against loss or damage by fire, lightning, tornado, windstorm, hail, explosion, riot attending a strike, civil commotion, vandalism, sprinkler leakage, aircraft, vehicles, smoke, or at the option of the Authority, under policies providing no less restrictive coverage than that provided by standard coverage endorsements, in an amount not less than and in such forms as recommended by the Authority's insurance consultant. The premiums for such insurance shall be paid by the Authority.

11.2 Restoration

Should any of the Fixed improvements constructed by the Authority in the Parking Structure or

QTA be damaged or destroyed, the Authority shall, immediately after such damage or destruction, cause to be prepared plans, specification, and estimates of the cost for repairing, replacing, or reconstruction the damaged or destroyed property in accordance with the original design, subject to modifications thereof as may be approved in writing by concessionaire and the Authority. The improvements shall be prepared with due diligence by the Authority. If any insurance or other proceeds are payable by reason of such damage or destruction, they shall be applied, as promptly as practical, to the repair, replacement or reconstruction of the damaged or destroyed property, in accordance with such plans and specification. To the extent that the damage or destruction is not covered by insurance and is due to the negligent act or omission of Concessionaire, upon completion of repairing, replacing, or reconstruction, the Authority shall submit an invoice for the difference to Concessionaire and Concessionaire shall promptly pay the difference to the Authority. Except to the extent that damage or destruction is due to any negligent act or omission of Concessionaire, should Concessionaire be unable to occupy the damaged or destroyed Operating Area, the charges payable herein for all space in the Parking Structure shall abate from the time of such damage or destruction until such time as the Parking Structure and/or QTA is fully restored and certified by the Authority's Engineering Division and ready for occupancy.

12. HAZARDOUS MATERIALS

12.1 Concessionaire shall promptly respond to and clean up any release or threatened release of any Hazardous Material into the drainage systems, soils, groundwater, waters, or atmosphere caused by Concessionaire, in a safe manner, in accordance with applicable federal, State, and local statutes, ordinances, and regulations, and as authorized or approved by all federal, State, or local agencies having authority to regulate the permitting, handling and cleanup of hazardous Materials. Any Hazardous Materials shall be handled, stored, transported, and disposed of in accordance with all applicable federal, State, and local statutes, ordinances and regulations.

12.2 Definition of hazardous Materials

The term "Hazardous Materials" shall mean any substance, chemical, or waste which at any time shall be defined as hazardous, toxic, or dangerous under applicable federal, state, or local laws or regulations that govern: (i.) the existence, cleanup, or remedy of contamination on property; (ii.) the protection of the environment from spilled, deposited or otherwise in place contamination; (iii.) control of hazardous wastes; or (iv.) the use, generation, transport, treatment, removal or recovery of hazardous

substances, including building materials.

12.3 Additional Hazardous Materials

Except for automobile washing soaps, window washing fluids, and fuel and oil products necessary to its operation of the Concession which can be safely stored and used on the Operating Area, Concessionaire shall not store, use, or dispose of on the Operating Area, any Hazardous Materials which are explosive, toxic or otherwise hazardous unless Concessionaire has first received the written authorization of the Authority and Concessionaire complies with any conditions as the Authority may impose, including the submission to the Authority of all material Safety Data Sheets (MSDS) for the chemicals stored on the Operating Area. The Authority shall be responsible for all hazardous materials existing on the Operating Area prior to commencement of the Agreement, as well as for any hazardous materials that migrate onto the Operating Area from adjacent areas not related to the activities of Concessionaire, or other concessionaires.

12.4 Hazardous Machinery

No machinery or apparatus shall be used or operated on the Operating Area that will injure or damage the Operating Area or the areas adjacent to the Operating Area.

13. UNDERGROUND STORAGE TANKS (USTs)

13.1 Installation

The Authority shall install three new USTs ad connecting piping at the QTA as provided in this Agreement. No other USTs shall be installed except with the explicit written approval of the Authority and subject to any conditions the Authority sets.

13.2 Operation and Maintenance

Concessionaire, in cooperation with the other rental car concessionaires, shall be responsible for the operation of the USTs. The coordination and operation of the USTs shall be subject to the overview of the Working Group. Authority shall be responsible for the proper care and maintenance of the USTs, and piping during the Operating Period of this Agreement, Concessionaire shall be responsible for the proper care and maintenance of the fuel dispensers and associated piping during the Operating Period of the Agreement.

13.3 Leak Detection

The Authority, together with the rental car concessionaires, shall be responsible for regularly monitoring and inspecting the USTs and for performing leak detection tests theron in accordance with federal and

state law. The Authority shall be notified immediately of any leaks or releases discovered at any time by Concessionaire.

13.4 Insurance

Concessionaire, together with the other rental car concessionaires, shall be responsible for requiring suppliers of gasoline for all rental car concessions to carry adequate insurance for their fuel supplying services to the heretofore identified USTs. Prior to the Date of Beneficial Use, Concessionaire, in conjunction with other concessionaires under similar agreements, shall furnish to the Authority a certificate or certificates of insurance in the form satisfactory to the Authority demonstrating that suppliers of gasoline are insured to the satisfaction of the Authority.

13.5 Remediation of Gasoline and Waste Oil Releases by Concessionaire

In the event of any release of gasoline, waste oil or other petroleum product to the environment from a UST caused by Concessionaire or its employees, contractors or agents, but not due to a defect in the design or installation of the UST, Concessionaire shall be responsible for the initial abatement, site characterization and corrective action in accordance with the requirements of all applicable federal and state law. All reports and proposals shall be submitted

to the Authority simultaneously with submission to the federal and state officials. Concessionaire shall continue remediation for as long as required and shall remain liable for any future expenses from incomplete remediation of the release which may later be discovered. Concessionaire shall be responsible for proper management and disposal of removed contaminated soils pursuant to all applicable federal, State or local laws or regulations. In no case shall contaminated soils be disposed directly to a landfill. Concessionaire shall work with the Authority to minimize the disruption caused by the remediation activities. If the response to a release is not undertaken and completed by Concessionaire in a timely manner, the Authority reserves the right to undertake the response itself and Concessionaire shall be responsible for all the Authority's expenses incurred in connection with the response to the release of petroleum product plus an overhead fee of fifteen (15)%.

14. STORMWATER AND INDUSTRIAL WASTEWATER

14.1 Stormwater Conveyance

Concessionaire is authorized to discharge stormwater into the Authority-owned stormwater discharge conveyance or storage system (the "System") Concessionaire's discharge shall be limited to stormwater discharged pursuant the

Authority's stormwater permit, if any, and shall comply with this Agreement, all terms of any stormwater permit issued by the Ohio EPA to the Authority, all applicable terms of any stormwater pollution control plans ("plans") if any, the terms of any other applicable agreements between Concessionaire and the Authority and any applicable rules governing stormwater adopted by the Authority in response to changes of law or stormwater permit terms.

14.2 Discharge and Treatment of Industrial Waste Water

Concessionaire shall not, and shall also ensure that its employees, agents, Concessionaires, and invitees do not, discharge any industrial wastewater into any portion of the System. Concessionaire shall be responsible for making concessionaire's own arrangements to discharge into the municipal sanitary sewer system. The Authority shall have the right to review and approve or disapprove any industrial wastewater discharge treatment system of any kind to be installed or utilized upon the Operating Area, and the right to decide whether or not to allow or condition the installation or utilization of such an industrial waste water discharge treatment system on the Operating Area shall be within the sole discretion of the Authority. Without limiting the generality of the obligations of Concessionaire set forth in this Section, Concessionaire shall permit and

treat all industrial waste water generated by Concessionaire's operations to comply with all Environmental Laws and shall obtain the required permit(s) needed to allow Concessionaire to recycle, discharge, or otherwise dispose of all industrial waste water into a sanitary sewer facility on the Operating Area.

14.3 Environmental inspection

The Authority reserves the right, at any time, an from time to time, after notice to Concessionaire, to inspect the Operating Area and Concessionaire's operations on and use of the Operating Area; (i.) for the presence of and/or Concessionaire's management of Hazardous Substances; (ii.) for compliance with Environmental Laws or the environmental provisions of this Agreement; and (iii.) to facilitate the Authority's environmental management, permitting and analysis related to the Operating Area or any other property of the Authority.

15. ENVIRONMENTAL REMEDIATION

15.1 Releases and Violations

In the event of a violation of an Environmental Law, a violation of an environmental provision of this Agreement, a Hazardous Substance Release, or the threat or reasonable suspicion of the same, for which Concessionaire

is responsible under this Agreement, Concessionaire shall immediately undertake all acts necessary or appropriate to cure or correct the violation or investigate, contain and stop the Hazardous Substance Release. Concessionaire shall promptly undertake all remedial and/or removal actions necessary or appropriate to ensure that any Hazardous Substance Release is eliminated and that any violation of any Environmental Law or environmental provision of this Agreement is cured or corrected. Concessionaire shall remove, at Concessionaire's sole expense, all Hazardous Substances for which Concessionaire is liable under this Agreement or under any Environmental Law, and shall restore the Operating Area or other affected property or water to, as nearly as possible, its natural condition. In the event that any remediation or removal required by this Agreement cannot reasonably be completed prior to the termination or expiration of this Agreement, Concessionaire shall not be in default of its remediation obligations so long as Concessionaire immediately commences all investigation, containment, remediation and removal activities within thirty (30) days, or sooner if required by Environmental Laws, and diligently and continuously pursues such activities until completion. Within thirty (30) days following completion of any investigatory, containment, remediation and/or removal action required by this Agreement, Concessionaire shall provide the Authority with a written report outlining in detail what has been done and the results.

15.2 The Authority's Right to Approve

The Authority shall have the right to approve or disapprove all investigatory, containment, remediation and removal procedures and the companies and/or individuals conducting such procedures which are required by this Agreement or by any Environmental Laws, whether on the Operating Area or any affected property or water. Concessionaire shall not initiate any risk assessment based remediation or closure without the prior written consent of the Authority, which consent may be withheld or conditioned in the Authority's sole discretion. The Authority will have the right to require Concessionaire to request oversight from the OEPA of any investigatory, containment, remediation and removal activities and/or require Concessionaire to seek a statement from OEPA of No Further Action. Concessionaire shall promptly notify the authority upon becoming aware of: (i.) a violation or alleged violation of any Environmental Law related to the Operating Area or to concessionaire's occupation or use of the Operating Area or any environmental provision of the Agreement; (ii.) any Hazardous Substance Release on, under or adjacent to the Operating Area, or threat of or reasonable suspicion of any of the same; (iii.) any notice or communication from a governmental agency or any other person directed to concessionaire relating to any Hazardous Substance Release or any violation or alleged violation of

any Environmental Laws which relate to the Operating Area or the Concessionaire's occupation or use of the Operating Area; and (iv.) any Hazardous Substance Release or violation of Environmental law discovered by Concessionaire on property or in the air or water adjacent to the Operating Area.

15.3 Environmental Record Keeping

Concessionaire shall maintain, for the duration of the Agreement for periodic inspection by the Authority, and deliver to the Authority at the Authority's request, true and correct copies of all records required to be maintained pursuant to any Environmental laws related to the Operating Area or to concessionaire's occupation or use of the Operating Area. Such records shall include, but not be limited to, Material Safety Data Sheets ("MSDS"), for all Hazardous Substances used or stored on the Operating Area. MSDS information shall be kept current and in a place known to and accessible to the Authority.

15.4 The Authority's Right to perform

In the event Concessionaire fails to perform any of its obligations under this section or any Environmental Laws, the Authority shall have the right, upon giving Concessionaire ten (10) business days written notice, except no prior notice shall be required in the event of an

emergency, to perform such obligations and charge Concessionaire all resulting costs associated with performing Concessionaire's obligations ("Environmental Costs"). The Authority may not commence performance on behalf of Concessionaire under this section if during the ten (10) business day period, Concessionaire promptly begins and diligently pursues to completion the performance of the obligations set forth in the Authority's notice. In the event the Authority determines that an emergency exists and concessionaire is unavailable, unwilling or unable to take immediate and appropriate action, the Authority may take whatever immediate action it deems necessary and charge Concessionaire the resulting Environmental Costs.

16. DEFAULTS BY CONCESSIONAIRE

16.1 Types of Default

Concessionaire shall be in Default under this Agreement if, after ten (10) calendar days written notice or whatever notice is specifically provided for elsewhere in this Agreement, whichever is greater, from the Authority, Concessionaire fails to remedy or commence remediation if the remedy cannot reasonably be completed within ten (10) calendar days, any of the following occurrences:

16.1.1 Concessionaire's failure to comply with a material provision of this Agreement, including but

not limited to a failure to pay any fee or other amount due under this Agreement within ten (10) calendar days after it is due, or any different period expressly provided by this Agreement or by applicable law;

16.1.2 To the extent permitted by the United States Bankruptcy Code:

16.1.2.1 Concessionaire's insolvency;

16.1.2.2 An assignment by concessionaire for the benefit of creditor;

16.1.2.3 Concessionaire's filing of a voluntary petition in bankruptcy;

16.1.2.4 An adjudication that Concessionaire is bankrupt;

16.1.2.5 The appointment of a receiver with respect to Concessionaire's property, and the receiver is not discharged within thirty (30) calendar days;

16.1.2.6 The filing of an involuntary petition of bankruptcy and Concessionaire's failure to secure a dismissal of the petition within thirty (30) calendar days after filing;

16.1.2.7 Attachment of or the levying of execution on any interest in this Agreement and Concessionaire's failure to secure discharge of the attachment or release of levy of execution within ten (10) calendar days;

16.1.2.8 Concessionaire becomes a corporation in dissolution or voluntarily or involuntarily forfeits its corporate charter;

16.1.3 Concessionaire's failure to comply with all applicable federal, state, and local laws and rules,including but not limited to Authority ordinances and reasonable rules established by the Authority's Executive Director, for more than thirty (30) calendar days after Concessionaire's receipt of written notice of the failure, or a reasonable longer period if Concessionaire promptly undertakes and works diligently toward effecting a cure of the breach;

16.1.4 Concessionaire's failure to timely commence operating a rental car concession in concessionaire's Operating Area;

16.1.5 Concessionaire's abandonment of rental car concession operations in all or any part of Concessionaire's Operating Area;

16.1.6 Concessionaire's default under its Service Facility lease with the Authority.

16.2 Notice of Termination

This Agreement is subject to the limitation that, if a Default occurs, the Authority may give to Concessionaire a Notice of Termination of this Agreement. The notice shall specify the termination date and the reason for the Notice. The termination date may occur no sooner than seven (7) calendar days from the date of service of the Notice. Termination cannot occur unless a Notice of Termination

has been served upon Concessionaire relating specifically to the Default for which the Agreement is being terminated. Provided, however, that in the event the Default involves a failure to perform obligations and the same or similar failure occurs more than three (3) times in any twelve-month period, after a reasonable opportunity to cure in each case, the Authority shall not be required during the remaining term of the Agreement to provide any notice and opportunity to cure prior to issuing a Notice of Termination. At the termination date, the term of this Agreement shall expire and all of the rights and interests of Concessionaire under this Agreement shall end. Concessionaire shall then surrender Concessionaire's Operating Area to the Authority. Concessionaire's liability under all of the provisions of this Agreement shall continue as though the termination had not occurred, however.

16.3 Termination due to Concessionaire's Default

16.3.1 If this Agreement is terminated because of a Default, the Authority or its agents or employees may immediately, or at any time thereafter, re-enter Concessionaire's assigned Operating Area and remove Concessionaire, Concessionaire's agents, subcontractors, invitees and property from Concessionaire's Operating Area. Re-entry and removal may be affected by summary

dispossess proceedings, by any suitable action or proceeding at law, by force, or otherwise. The Authority shall be entitled to the benefits of all provisions of law respecting speedy recovery of Concessionaire's assigned Operating Area held over by concessionaire or the proceedings in forcible entry and detainer. Concessionaire waives any right to the service of any notice of the Authority's intention to re-enter provided for by any present of future law. The Authority shall not be liable in any way in connection with any action it takes pursuant to this paragraph. Concessionaire's liability shall survive the Authority's re-entry, the institution of summary proceedings, and the issuance of any warrants with respect thereto.

16.3.2 If this Agreement is terminated because of Default of Concessionaire, concessionaire shall remain liable, in addition to accrued liabilities, to the extent legally permissible for the amounts that Concessionaire would have been required to pay to the Authority under this Agreement had the Agreement not been terminated, including Garage Space Rent and Minimum Annual guarantee. Concessionaire shall pay as damages, the difference between amounts obtained by adding the amounts owed to the Authority plus the Authority's expense in reentering or repossessing concessionaire's Operating Area, putting said operating area in proper repair, altering said

operating area for a new concessionaire, protecting said operating area, contracting expenses to obtain a new concessionaire, minus the revenue to be paid to the Authority by a new concessionaire occupying said operating area for the remaining Agreement period. In addition, concessionaire shall pay to the Authority such sums as the court which has jurisdiction there over may adjudge as reasonable attorney's fees with respect to any successful lawsuit or action instituted by the Authority to enforce the provisions of this Agreement.

16.4 Right of Authority to enter New Concession Agreement

The Authority may enter into a new concession agreement with another Concessionaire that will occupy the assigned portion of the Operating Area for all or any part of the unexpired portion of the term of this Agreement or for any longer period. The Authority has the sole and absolute discretion with respect to the selection of a new Concessionaire and the use of the assigned portion of the Operating Area. The Authority shall be under no obligation to enter into or attempt to enter into a new contract for the assigned portion of the Operating Area.

16.5 Cure by Authority

If concessionaire is in default under this Agreement, the Authority may cure the Default at any time through any

action deemed appropriate by the Authority for the account and at the expense of Concessionaire. Concessionaire shall reimburse the Authority for any amounts expended by the Authority in connection with the cure. Such cure shall not constitute a waiver of the Authority's rights with respect to that or any other Default, unless otherwise expressly stated in writing by the Authority.

16.6 Authority's Rights and Remedies

The Authority's rights and remedies set forth herein shall be in addition to any other right and remedy now and hereafter provided by law. All rights and remedies shall be cumulative and not exclusive of each other. No delay by the Authority in exercising a right or remedy shall constitute a waiver or acquiescence to the Default. No waiver of a Default shall be effective unless it is in writing. No waiver of a Default shall extend or affect any other Default or impair any right or remedy with respect thereto.

16.6.1 The right to lien on the inventory and other property of concessionaire is expressly granted to the Authority in any case where Concessionaire fails to pay amounts due to the Authority under this Agreement.

16.6.2 The Authority shall not be liable for any damage, including, but not limited to, loss of profit and Concessionaire shall not make a claim of any kind whatsoever against the Authority, its agents or representatives, by reason of any action taken pursuant to this Section 15.

columbus Municipal Airport Authority (the "Authority") with the following wording:

"The Amount of our draft represents funds payable to the Columbus Municipal Airport Authority by (*Insert Concessionaire's legal name*), which (*Insert Concessionaire's legal name*) has failed to pay amounts owed in accordance with its concession Agreement wit the Authority dated as of may 1, 1998."

2. The Original of this Letter of Credit.

We engage with you that drafts drawn under and in compliance with the terms of this letter of credit will be duly honored by us upon receipt at our offices at (*Bank's Office Address*) of the document specified above.

Yours Faithfully,

(Insert name of bank)

_____

Authorized Signature

Facilities therein in a state of good repair, with the exception of reasonable wear and tear and damage by loss or casualty not covered by insurance which Concessionaire is required to maintain pursuant to this Agreement and not otherwise attributable to concessionaire's fault or negligence.

16.8.2 Abandonment

Concessionaire shall be deemed to have abandoned to the Authority any property which it has failed to remove from Operating Area within fifteen (15) calendar days after the end of the Operating Period of the Agreement or the effective date of termination thereof, unless the Authority grants additional time for this purpose in writing. After the expiration of the fifteen (15) day period, or any extension thereof granted by he Authority, the Authority shall have the right to remove the property and restore the area to a satisfactory condition and hold Concessionaire liable for all costs incident thereto. In the event it is necessary for the Authority to remove such property, the Authority shall not sustain or be charged with any liability by reason of the removal or custodial care of the same.

17. DEFAULT BY THE AUTHORITY

17.1 Events of Default by Authority

The Authority shall be in default under this Agreement if, after reasonable written notice form Concessionaire, the Authority fails without excuse to remedy any of the following occurrences:

17.1.1 The permanent abandonment of the Airport for scheduled certificated airline service;

17.1.2 The issuance by any court of competent jurisdiction of any injunction preventing or restraining the use of the Airport for sixty (60) calendar days or more in a manner that substantially prevents Concessionaire from conducting the operations authorized by this Agreement.

17.1.3 The exercise by an agency of the United States Government for ninety (90) calendar days or more of control over the Airport and its facilities in a manner that substantially prevents Concessionaire from conducting the operations authorized by this Agreement.

17.1.4 The Authority's failure to substantially comply with a material provision of this Agreement for more than sixty (60) calendar days after written notice of the failure from Concessionaire.

17.2 Remedies for Authority's Default

In addition to any other remedies Concessionaire may have at law or in equity, if the Authority is in default under this Agreement, concessionaire may terminate this Agreement by written notice to the Authority. The Authority shall not be deemed in default if the Authority has initiated appropriate remedial action prior to the notice of termination and diligently pursues that remedial action to completion. In no event shall Concessionaire be entitled to recover lost profits or consequential damages from the Authority for a default under this Agreement.

18. GENERAL PROVISIONS

This Agreement is one of multiple on-Airport Rental car Concession Agreements. It is the intent of the parties that no concessionaire enjoy any rights, profits or other conditions more favorable to such concessionaire than those enjoyed by all other on-airport rental car concessionaires.

18.1 Waiver of Performance

The failure of either Party to insist, in any one or more instances, upon a strict performance by the other of any of the provisions, terms, covenants, reservations, conditions, or stipulations contained in this Agreement shall not be considered a waiver or relinquishment thereof, but

the same shall continue and remain in full force and effect, and no waiver by either Party of any provision, term, covenant, reservation, condition, stipulation, breach or default hereunder shall be deemed to have been made in any instance unless expressed in writing and agreed to by the Parties.

18.2 Reservation by Authority regarding Utility Lines and Services

The Authority reserves to itself the right to install, maintain, utilize and repair existing utility and drainage easements over, under or across any portion of the Operating Area and concessionaire's Designated Service facility located on property leased from the Authority, and to run new water, sewer, electrical, telephone, gas, drainage and other lines over, under or through the Operating Area and to grant necessary utility easements therefor; provided, however that in the exercise of such rights, Concessionaire's use of the Operating Area and Operating Equipment shall not be unreasonably impaired and any damage to the Operating Area or to the Operating Equipment caused by the Authority as a result thereof shall be repaired without cost to the Concessionaire. Such lines and services shall be adequately protected from damage by operations on the outside of the service facilities Operating Area. The Authority shall be obligated to repair and fully restore any damage to the ground, pavement, or other improvements on the service

facilities resulting from the laying, installation, repair or maintenance or from subsequent leaks or breaks in the lines or services. The Authority shall endeavor to provide a two week notice to Concessionaire for new utility line and service installations and prior notice, if possible, for all maintenance and repairs conducted by the Authority or its Concessionaires.

18.3 Rights to Maintain Airport

The Authority reserves the right to further develop, improve, repair and alter the Airport and all roadways, parking areas, structured parking facilities, Terminal Building, landing area and taxiways as it may reasonably see fit, and the Authority shall be free from any and all liability to Concessionaire for loss of business or damages of any nature whatsoever to Concessionaire occasioned during the making of such improvements, repairs, alterations and additions.

18.4 Notices

18.4.1 Method

All notices to be given to the Parties hereto shall be in writing unless otherwise stated and shall be properly given when personally delivered to the specific address and left with a responsible person, or delivered by overnight service such as Federal Express and, in both instances, an appropriate receipt is obtained, or when sent by facsimile to the facsimile numbers listed below and an appropriate receipt is obtained, or when sent by registered

or certified mail addressed to the Parties at their respective addresses herein given below. The Parties may change the information below upon ten (10) calendar days written notice give as herein specified. The date of notice shall be deemed, when notice is mailed, to be the date of mailing so long as the Postal Service certified actual delivery. A refusal of an overnight service or registered or certified mail notice shall constitute actual delivery hereunder. A notice given by registered or certified mail shall be presumed received by the addressee seventy-two (72) hours after it was deposited in the mail within the continental United States, properly addressed and with postage prepaid. The U.S. Postal Service receipt showing the date of mailing shall be prima facie evidence of the date of mailing.

18.4.2 Addresses

Until the addressee gives written notice of a change, notices shall be delivered to:

AUTHORITY:

Columbus Municipal Airport Authority
Attn: Executive Director
4600 International Gateway
Columbus, OH 43219
with a copy to General Counsel

CONCESSIONAIRE:

_____

_____

18.5 Confidentiality

Financial information, excluding Total Gross Revenues data, submitted by Concessionaire to the Authority during the Operating Period of the Agreement shall be considered proprietary and confidential and shall not be publicly disclosed or released to other persons outside the Authority. Concessionaire's Itemized Certified Statement, to extent permitted by Ohio law, shall provide the number of rental days and rental transactions which shall be maintained in confidentiality by the Authority as confidential commercial trade information not to be released to others outside the Authority.

18.6 Assignment and subletting

Concessionaire shall not transfer or assign this Agreement, or any part hereof, or interest herein, or sublease any of the Operating Area hereunder, except with the prior approval of the Authority's Executive Director and subject to whatever reasonable limitations and conditions that are required by the Authority. Any other attempted transfer, assignment or sublease shall be void and shall confer no rights upon any third person. No assignment or sublease shall relieve Concessionaire of any obligation under this Agreement unless otherwise agreed by the Authority.

Notwithstanding the foregoing, this section shall not be interpreted to preclude the assignment of this Agreement to a parent, subsidiary, or merged company if such parent, subsidiary, or merged company assumes all rights and obligations of this Agreement. Written notice of such assumption shall be provided to the Authority by the parent, subsidiary or merged company thirty (30) calendar days prior to the effective date of such assignment.

18.7 Title to Capital Additions and Improvements

Upon termination or expiration of this Agreement, title to all additions, structures, installations, and improvements placed upon the Operating Area shall automatically vest in the Authority. The Authority shall have no buy-out payment obligations to the Concessionaire with respect to Concessionaire's Capital Additions and Improvements. Nothing in this section shall be deemed to prevent Concessionaire from removing its trade fixtures and moveable equipment and furniture, including but not limited to car wash equipment, maintenance racks, and counter inserts.

18.8 Requests for Approval

Any request by concessionaire for approval under this section shall be made in writing at least thirty (30) calendar days before the assignment would occur, and must

be accompanied by a full description of the assignment, including copies of relevant documents. The Authority shall not unreasonably withhold its approval of an assignment or transfer, provided that; (i.) immediately prior to the assignment or transfer, the quality of the successor's management staff and the successor's financial condition equal or exceed the quality of the concessionaire's management staff and Concessionaire's financial condition; (ii.) the assignee assumes all of the obligations under this Agreement; and (iii.) if determined necessary by the Authority in the reasonable exercise of its sole discretion, Concessionaire guarantees the performance of the successor under this Agreement.

18.9 Subordination to Agreements With the United States

This Agreement is subject and subordinate to the provisions of any agreement already made or to be made in the future between Authority and the United States relative to the operation or maintenance of the Airport, the execution of which is a condition precedent to the transfer of federal rights or property to Authority for Airport purposes, or to the Federal Aviation Act of 1958, as amended. The Authority represents that it has no existing agreements with the United States that conflict with the express provisions this Agreement.

18.10 Loss of Business

The Authority shall not be liable to Concessionaire for any loss of business or revenues sustained by Concessionaire as a result of any change in the operation or configuration of, or any change in any procedure governing the use of , the Terminal Buildings or the Airport.

18.11 Headings

The headings in this Agreement are for convenience of reference, and in no way define, limit, or describe the scope or intent of any provisions of this Agreement.

18.12 Severability

If any provision of this Agreement or the application of any provision of this Agreement to any person or circumstances shall be invalid or unenforceable to any extent, the remainder of this Agreement or the application of such provision to persons or circumstances other than those to which it is invalid or unenforceable, shall not be affected thereby and each provision of this Agreement shall be valid and be enforced to the fullest extent of the law.

18.13 Waiver of Claims

Concessionaire waives any claim against Authority or the Authority's employees, concessionaires, or agents for loss of anticipated profits caused by any suit or proceeding

directly or indirectly attacking the validity of any part of the Agreement, or by any judgment or award in any suit or proceeding declaring this Agreement null, void, or voidable, delaying performance of any part of this Agreement.

18.14 Incorporation of Exhibits

All exhibits and documents referred to in this Agreement are incorporated into this Agreement by this reference.

18.15 Successors and Assigns Bound

This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties where succession or assignment is permitted by this Agreement.

18.16 Right to Amend

If the U.S. Department of Transportation federal Aviation Administration, or its successor, requires changes in this Agreement as a condition precedent to the granting of funds for the improvement of the Airport, or otherwise, Concessionaire agrees to consent to those changes subject to any additional changes to this Agreement required by equity.

18.17 Time of Essence

Time is of the essence of this Agreement.

18.18 Force Majeure

The Authority shall not be liable to concessionaire for any breach of this Agreement due to causes beyond the

Authority's control, including but not limited to strikes, boycotts, labor disputes, embargoes, acts of God, acts of the public enemy, acts of superior governmental authority, weather conditions, floods, riots, rebellion, and sabotage. Nothing in this section shall be deemed to excuse any part of Concessionaire's obligations to make any payments due under this Agreement.

18.19 Gender and Number

Words of any gender used in this Agreement shall include any other gender. Words in the singular shall include the plural, unless the context clearly requires otherwise.

18.20 Aviation Easement

Concessionaire's right to use the Operation Area for the purposes as set forth in this Agreement shall be secondary and subordinate to the operation of the Airport. The Authority specifically reserves for itself, and for the public, a right of flight for the passage of aircraft in the air space above the surface of the Operating Area together with the right to cause noise in the air space as may be inherent in the present or future operation of aircraft.

18.21 No Right to Light, Air, or View

This Agreement conveys to concessionaire no right to sunlight, air or view.

18.22 Attorney's Fees

The prevailing party shall be entitled to reasonable attorney fees at trial and on appeal in any lawsuit brought with respect to this Agreement.

18.23 Amendment

This Agreement may be amended only by a writing signed by the authorized representatives of each party.

18.24 Relationship of Parties

The parties are independent Concessionaires with respect to one another. Neither party is the agent, principal, partner, or joint venturer of the other.

18.25 Venue

Venue for all disputes that arise out of this Agreement shall in a court of competent jurisdiction in Franklin County, Ohio.

18.26 Entire Agreement

This document, including all exhibits and other documents incorporated by reference, and the separate lease between the parties for Service Facility Lease, constitute the entire agreement between the parties regarding rental car operations at the Airport, and, as of the Effective Date, shall supersede all prior or contemporaneous agreements or communications regarding the same subject, including but not necessarily limited to any earlier agreement or storm water agreement.

18.27 Authority to Sign

Each individual signing below on behalf of a party certifies by signing that he or she is properly authorized to sign this Agreement and to fully bind the party to the terms and conditions of this Agreement.

Signed in the presence of: _____

_____ _____

Witness

COLUMBUS MUNICIPAL AIRPORT AUTHORITY

_____ BY: _____

Larry Hedrick A.A.E.
Executive Director
Columbus Municipal
Airport Authority

State of Ohio
County of Franklin, ss:

Before me, a Notary Public in and for said County and State, personally appeared the above named larry hedrick, Executive Director of Columbus Municipal Airport Authority who represented that he is authorized to execute the foregoing instrument and his free act and deed as such authorized representative of the Columbus Municipal Airport Authority.

In testimony whereof, I have hereunto set my hand and official seal at Columbus, Ohio, this ____, day of _____, 1998.

_____
Notary Public

State of _____
County of_____, ss:

Before me, a Notary Public in and for said County and State, personally appeared the above named _____, its _____, who represented that he/she is authorized to execute the foregoing instrument as his free act and deed as such authorized representative of _____.

_____
Notary Public

Exhibit A
Market Share Chart

Mkt Share	R/R (9 ft eq)	Counter Lin Ft	office Sqare Ft	Wash Bay	Fuel Island
<5	20	16	160	1*	1*
>=5<10	55	20	200	1	1
>=10<15	115	24	240	1	1
>=15<20	150	36	360	1	1
>=20<25	200	40	400	1	1
>=25	275	52	520	2	2

*Concessionaire's with a five percent (5%) or less market share may be required to share the wash bay and fuel island assigned to them with another concessionaire with five percent (5%) or less market share.

Exhibit B
Garage layout
and
Operating Area

"EXHIBIT B"

ADDENDUM NO. 3
INVITATION FOR BIDS
for
RENTAL CAR CONCESSIONS
at
PORT COLUMBUS INTERNATIONAL AIRPORT

March 13, 1998

TO ALL PROSPECTIVE BIDDERS:

I. Changes to the Concession Agreement - See the changes below. revised contract pages with the new changes will be delivered to all local operators, and sent to prospective bidders who do not have local operations. Please insert the revised pages into your existing copies of the concession agreement to replace corresponding pages without the new changes.

II. Letter of Credit - A revised sample letter of credit. The only change to the letter of credit form is the revision of the contract date in item 1 to May 1, 1998.

CHANGES TO CONCESSION AGREEMENT

Article 2

1. Paragraph 2.5.2 Delete the second sentence which read: "Concessionaire's with a five percent (5%) or less market share may be required to share the fuel island assigned to them". Replace with "If Concessionaire has one of the two smallest market shares, Concessionaire may be required to share the fuel island assigned to them with the other concessionaire with one of the smallest market shares.

2. Paragraph 2.5.5 Delete the last sentence which read: "The Authority reserves the right to reallocate the assigned Fuel Area and Wash Area in the event that

any concessionaire's Market Share for a twelve month period as compared to the 1999 calendar has changed by more than ten (10) percentage points," Add new last sentence to read: "The Authority reserves the right to reallocate the assigned Fuel Area and Wash Area assigned to Concessionaire annually on March 1, beginning March 1, 2001. If the Authority elects an annual reallocation, it shall be based on Market Share for the previous calendar year."

Article 4

3. Paragraph 4.6.1 Delete Section 4.6.1. Add new Section 4.6.1 to read:

"Concessionaire acknowledges that the payments by Concessionaire to the Authority under this Agreement are for Concessionaire's use of facilities at the Airport, and that none of those payments reflects a fee

that is imposed by the Authority upon customers renting cars from Concessionaire. Concessionaire understands that the Authority does not support the practice of transferring Concessionaire's obligation for payment of the Privilege Fee due herein to its customers. Concessionaire is prohibited from using the following words, or any form thereof:

Airport, Authority, Government, Port Columbus, Concession, Access, Passage, Cost of Doing Business,

Fee, Toll, Assessment, or Tax in describing any surcharge the Concessionaire may impose on customers. Any charges made by customers in an attempt to recover its costs in operating under this Concession Agreement must appear adjacent to time and mileage charges. Concessionaire is prohibited from stating or implying,

Concessionaire on its in writing or verbally, that the Airport or Authority imposes or approves of any such direct charge to a customer. The authority understands the Garage Space Rent will be a substantial increase over the prior rent for the concessionaire's service facilities. Therefore, the Authority authorizes, but does not require, the separate statement of a Garage Recoupment Surcharge on the terms and conditions specified herein.

Article 8

4. Section 8.1

In the Second to last sentence of Section 8.1, immediately after the phrase "The Authority retains the right" add the phrase "to develop and implement regulations governing the coordination of rental car operations in the Operating Area, and."

Article 18

5. Paragraph 18.1	Add new section 18.1 "Specific Performance of Authority's Rights" to read: "The Authority shall have the right to obtain specific performance of any and all covenants or obligations of Concessionaire under this Agreement and nothing contained in this Agreement shall be construed as or shall have the effect of abridging such right.

Addendum No. 3
Invitation to Bids
March 13, 1998

IRREVOCABLE LETTER OF CREDIT

(Sample format)

Issuing Bank: (*Insert Issuing Bank and Address*)

Issue Date: _____

Letter of Credit No: _____

Applicant

(*Insert Concessionaire's legal name and address*)

Beneficiary Amount

Columbus Municipal
Airport Authority
Port Columbus International Airport
4600 International Gateway
Columbus, OH 43219

Gentlemen:

We hereby establish, by order of our client (*Concessionaire's Legal Name*), this Irrevocable Letter of Credit in your favor in the amount not to exceed (*Amount in writing*) _____ (*Amount in dollars*) ___,for the account of (*Concessionaire's legal name*) available by your draft sight drawn on us bearing the clause "Drawn under (*Insert legal name of bank*), Letter of Credit No.(*Insert Letter of Credit Number*) when accompanied by the following documents:

1. A statement signed by the Executive Director of the columbus Municipal Airport Authority (the "Authority") with the following wording:

"The Amount of our draft represents funds payable to the Columbus Municipal Airport Authority by (*Insert Concessionaire's legal name*), which (*Insert Concessionaire's legal name*) has failed to pay amounts owed in accordance with its concession Agreement wit the Authority dated as of may 1, 1998."

2. The Original of this Letter of Credit.

We engage with you that drafts drawn under and in compliance with the terms of this letter of credit will be duly honored by us upon receipt at our offices at (*Bank's Office Address*) of the document specified above.

Yours Faithfully,

(Insert name of bank)

_____

Authorized Signature

ADDENDUM NO. 4
INVITATION FOR BIDS
for
RENTAL CAR CONCESSIONS
at
PORT COLUMBUS INTERNATIONAL AIRPORT

March 17, 1998

ALL PROSPECTIVE BIDDERS

Changes to the Concession Agreement - See the change below. Please insert copies of the faxed page into your concession agreements to be submitted with your bid. If a revised page is not inserted into the agreements, the Authority will insert the revised page after the bid opening on March 18, 1998.

CHANGES TO CONCESSION AGREEMENT

Article 4

Section 4.4 In the first sentence immediately after the phrase "The intentional diversion" insert the phrase "of Airport related customers".

Ohio Rev.Code § 4582.31

4582.31 POWERS. A port authority created in accordance with section 4582.22 of the Revised Code may:

(A) Adopt bylaws for the regulation of its affairs and the conduct of its business;

(B) Adopt an official seal;

(C) Maintain a principal office within its jurisdiction, and maintain such branch offices as it may require;

(D) Acquire, purchase, construct, reconstruct, enlarge, furnish, equip, maintain, repair, sell, exchange, lease or rent to, lease or rent from, or operate port authority facilities;

(E) Straighten, deepen, and improve any channel, river, stream, or other water course or way which may be necessary or proper in the development of the facilities of a water port;

(F) Make available the use or services of any port authority facility to one or more persons, one or more governmental agencies, or any combination thereof;

(G) Issue bonds or notes for the acquisition or construction of any port authority facility or other permanent improvement which a port authority is authorized to acquire or construct, in compliance with Chapter 133. of the Revised Code, except that such bonds or notes may only be issued pursuant to a vote of

the electors residing within the area of jurisdiction of the port authority. The net indebtedness incurred by a port authority shall never exceed two per cent of the total value of all property within the territory comprising such port authority as listed and assessed for taxation.

(H) Issue port authority revenue bonds beyond the limit of bonded indebtedness provided by law, payable solely from revenues as provided in section 4582.48 of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of providing funds to pay the costs of any port authority facility or facilities or parts thereof, pursuant to Section 13 of Article VIII, Ohio Constitution, and in order to create or preserve jobs and employment opportunities and improve the economic welfare of the people of the state;

(I) Apply to the proper authorities of the United States pursuant to appropriate law for the right to establish, operate, and maintain foreign trade zones and establish, operate, and maintain such foreign trade zones in accordance with the "Foreign Trade Zones Act," 48 Stat. 998 (1934), 19 U.S.C. 81a to 81u;

(J) Enjoy and possess the same rights, privileges, and powers granted municipal corporations under sections 721.04 to 721.11 of the Revised Code;

(K) Maintain such funds as it considers necessary;

(L) Direct its agents or employees, when properly identified in writing, and after at least five days' written

notice, to enter upon lands within the confines of its jurisdiction in order to make surveys and examinations preliminary to location and construction of works for the purposes of the port authority, without liability of the port authority or its agents or employees except for actual damage done;

(M) Promote, advertise, and publicize the port authority and its facilities; provide information to shippers and other commercial interests; and appear before rate-making authorities to represent and promote the interests of the port authority;

(N) Adopt rules, not in conflict with general law, governing the use of its property, grounds, buildings, equipment, and facilities, and governing the conduct of its employees and the public, in order to promote the public safety and convenience in and about its facilities and grounds, and to maintain order. Any such rule shall be posted at a prominent place in each of the facilities to which it applies. No person shall violate any lawful rule adopted and posted as provided in this division.

(O) Acquire by gift or purchase, hold, lease, and dispose of real and personal property and interests therein in the exercise of the powers of the port authority and the performance of its duties under sections 4582.21 to 4582.59 of the Revised Code;

(P) Acquire, in the name of the port authority, by purchase or otherwise, on such terms and in such

manner as the port authority finds proper, or by the exercise of the right of condemnation in the manner provided by section 4582.56 of the Revised Code, such public or private lands, including public parks, playgrounds, or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests as it finds necessary for carrying out sections 4582.21 to 4582.59 of the Revised Code, and compensation shall be paid for public or private lands so taken;

(Q) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under sections 4582.21 to 4582.59 of the Revised Code.

(1) When the cost under any such contract or agreement, other than compensation for personal services, involves an expenditure of more than ten thousand dollars, the port authority shall make a written contract with the lowest responsive and responsible bidder, in accordance with section 9.312 of the Revised Code, after advertisement once a week for not less than two consecutive weeks in a newspaper of general circulation in the county where the facility is located, and in such other publications as the port authority determines, which notice shall state the general character of the work and the general character of the

materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids; provided, that a contract or lease for the operation of a port authority facility constructed and owned by the port authority or an agreement for cooperation in the acquisition or construction of a port authority facility pursuant to section 4582.43 of the Revised Code or any contract for the construction of a port authority facility that is to be leased by the port authority to, and operated by, persons who are not governmental agencies and the cost of such facility is to be amortized exclusively from rentals or other charges paid to the port authority by persons who are not governmental agencies is not subject to the foregoing requirements and the port authority may enter into such contract, lease, or agreement pursuant to negotiation and upon such terms and conditions and for such period as it finds to be reasonable and proper in the circumstances and in the best interests of proper operation or of efficient acquisition or construction of such facility.

(2) Each bid shall contain the full name of every person interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the performance thereof secured.

(3) The port authority may reject any and all bids.

(4) A bond with good and sufficient surety, approved by the port authority, shall be required of all contractors in an amount equal to at least fifty per cent of the contract price, conditioned upon the faithful performance of the contract.

(R) Employ managers, superintendents, and other employees and retain or contract with consulting engineers, financial consultants, accounting experts, architects, attorneys, and such other consultants and independent contractors as are necessary in its judgment to carry out this chapter, and fix the compensation thereof. All expenses thereof shall be payable from any available funds of the port authority or from funds appropriated for such purpose by a political subdivision creating or participating in the creation of the port authority.

(S) Receive and accept from any federal agency grants for or in aid of the construction of any port authority facility or for research and development with respect to port authority facilities, and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions are made;

(T) Engage in research and development with respect to port authority facilities;

(U) Purchase fire and extended coverage and liability insurance for any port authority facility and for the principal office and branch offices of the port authority, insurance protecting the port authority and its officers and employees against liability for damage to property or injury to or death of persons arising from its operations, and any other insurance the port authority may agree to provide under any resolution authorizing its port authority revenue bonds or in any trust agreement securing the same;

(V) Charge, alter, and collect rentals and other charges for the use or services of any port authority facility as provided in section 4582.43 of the Revised Code;

(W) Provide coverage for its employees under Chapters 145., 4123., and 4141. of the Revised Code;

(X) Do all acts necessary or proper to carry out the powers expressly granted in sections 4582.21 to 4582.59 of the Revised Code.

No. 99-702

FILED
NOV 26 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

CAPITAL LEASING OF OHIO, INC.,
Petitioner,

v.

COLUMBUS MUNICIPAL AIRPORT AUTHORITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CAR RENTAL ASSOCIATION IN SUPPORT OF PETITIONER CAPITAL LEASING OF OHIO, INC.

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Rental Association

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IN THE

Supreme Court of the United States

No. 99-702

CAPITAL LEASING OF OHIO, INC.,
Petitioner,

v.

COLUMBUS MUNICIPAL AIRPORT AUTHORITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN CAR RENTAL ASSOCIATION IN SUPPORT OF PETITIONER CAPITAL LEASING OF OHIO, INC.

INTEREST OF THE *AMICUS CURIAE*

The American Car Rental Association (ACRA) is a voluntary, non-profit trade association dedicated exclusively to serving the interests of those in the business of renting automobiles.[1] Founded in 1978, ACRA unites its

[1] Counsel for ACRA authored this brief in whole. No one other than ACRA and its members made a monetary contribution to the preparation or submission of this brief. *See* SUP. CT. R. 37.6. The written consents of Petitioner and Respondent have been filed separately with the Clerk of the Court.

members in their commitment to the growth and vitality of the car rental industry by addressing regulatory, legislative, and policy issues of common concern. Today ACRA comprises six of the national car rental companies, including Budget Rent-a-Car Corporation, the licensor of Petitioner Capital Leasing of Ohio, Inc., dba Budget Rent-a-Car of Columbia (Capital). ACRA members account for 55% of car rental revenues and over 50% of the market.

The Columbus Municipal Airport Authority (Port Authority) demands that car rental companies who wish to lease counters in the terminal at Port Columbus International Airport pay a "privilege fee," a percentage of revenues generated from both Airport customers and local customers who never enter the Airport. Capital correctly asserts that this arrangement violates the Equal Protection Clause of the Fourteenth Amendment [2] because it arbitrarily penalizes Capital, who serves both Airport customers and the surrounding community, without furthering any legitimate state interest and contrary to the Port Authority's express statutory authority to charge corporate tenants only for the costs of services the Port Authority provides.

This privilege fee arrangement merits this Court's review because it is particularly invidious in its structure and rationale. The Port Authority demands from business fees in excess of its statutory authority, simply because it enjoys a government monopoly on access to Airport customers. The logic of the Port Authority's position, and of the opinions below, would permit any public authority anywhere in the United States to discriminate however it desired in the fees it charged. Thus the Port Authority's

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2 "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

conduct threatens businesses that contract with public authorities nationwide. Therefore ACRA submits this brief in support of the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Port Authority, a governmental entity, is obliged to observe the Equal Protection Clause by not discriminating among similarly situated business partners in ways that bear no rational relationship to any legitimate state interest. The Port Authority's privilege fee discriminates between companies that almost exclusively serve Airport customers from on-Airport facilities and those who serve both Airport and local customers from off-Airport facilities, by penalizing the latter for seeking local revenues. This fee is not rationally related to any legitimate governmental objective. To the contrary, it explicitly contravenes the Port Authority's enabling statute, which permits charges only for the cost of allowing others to use Airport facilities. Having no legitimate purpose, the privilege fee denies Capital equal protection of the laws.

This case has implications beyond the harm Capital suffers. The privilege fee scheme is dangerous precedent, for it tilts the economic playing field upon which car rental companies compete for local customers. Rather than permitting free competition on the normal fronts of price, quality, and service, the privilege fee significantly and arbitrarily raises the cost of serving local customers for car rental companies that serve Airport customers from an off-Airport facility. The privilege fee is analogous to a tying arrangement, in that the Port Authority is using its monopoly over the market for terminal access to Airport customers to extract revenues from the local car rental market. The courts have long recognized the intrinsic harm in such arrangements. If the Port Authority's position prevails, public transportation authorities across

the United States will be free to raise revenues through discriminatory fees levied on any corporate partners they choose. Because the Port Authority's practice departs from established law and presents a substantial question with national economic implications, this Court should grant the Petition for Certiorari.

ARGUMENT

I. THE PORT AUTHORITY'S PRIVILEGE FEE SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE.

A. The Port Authority Through the Privilege Fee Discriminates Against Capital.

Capital is one of several car rental companies that serve Airport customers. Like many of its competitors, Capital leases from the Port Authority a counter in the Airport terminal. It is thus similarly situated to its competitors in the car rental business.

Unlike Capital, the other car rental companies that lease counter space also maintain their fleet facilities on leased Airport property. Thus these companies do not serve local customers from their Airport facilities, as does Capital. But the Port Authority has levied a privilege fee, which it has no power to assess, on a portion of revenues generated from Airport and local customers. Because no car rental company serves the local market as much as Capital, Capital is hurt by the privilege fee like no one else.

The privilege fee imposed by the Port Authority discriminates between the rental companies with fleet facilities on Airport property, who almost exclusively serve Airport customers, and Capital, whose fleet facilities are off Airport property and who serves the broader community. Because Capital must now pay a percentage of

revenues the Airport does nothing to help generate, this economic discrimination heavily disadvantages Capital's ability to compete in the local market.

B. The Privilege Fee Is Arbitrary, Irrational, and Unrelated to Any Legitimate State Interest.

The courts below properly found that the Port Authority is a governmental entity because it contracts with businesses under authority of Ohio law. As such the Port Authority may not discriminate against Capital in violation of the Equal Protection Clause.[3] An economic regulation that discriminates among similarly situated groups violates the Equal Protection Clause if it charges any fee or imposes any condition that is not rationally related to a legitimate state interest.[4]

The law governing the conduct of the Port Authority demonstrates that there can be no legitimate state interest underlying this privilege fee. Under Ohio law government bodies may only charge fees as authorized by statute, and to exceed statutory bounds is to impose an unauthorized tax.[5] The Ohio Supreme Court settled this principle in *Cincinnati v. Roettinger*, where it held that Cincinnati

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[3] *Capital Leasing of Ohio, Inc. v. Columbus Mun. Airport Auth.*, 13 F. Supp. 2d 640, 655 (S.D. Ohio 1998) (citing *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458 n.5 (1979)), *aff'd*, 182 F.3d 916 (6th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3310 (U.S. Sept. 16, 1999) (No. 99-702).

[4] *City of New Orleans v Dukes*, 427 U.S. 297, 303-04 (1976).

[5] It is well settled that a charge for services furnished by a municipality to its inhabitants is not a tax, so long as the charge is not in excess of the entire cost of the service. However, where a license fee or a charge for a special service is excessive, or produces excessive funds which are applied to other unrelated uses, then it is deemed a tax, and thus subject to legislative control.

86 OHIO JUR. 3D Taxation § 7 (1988) (citations omitted).

could use the surplus from its water rates only to fund projects specified by statute.[6]

Ohio by statute also explicitly permits the Port Authority to levy fees only in exchange for services the Port Authority provides.

> A port authority may charge, alter, and collect rentals or other charges *for the use or services of any port authority facility* and contract in the manner provided by this section with one or more persons, one or more governmental agencies, or any combination thereof, desiring the use or services of the facility, and fix the terms, conditions, rentals, or other charges for such use or services.[7]

The district court characterized the privilege fee as "similar, if not identical to a space rental charge."[8] But if the Port Authority charges for any service an amount markedly greater than the cost of providing that service, then whatever the charge is called, it is an unauthorized tax.

Nor can the Port Authority legitimately point to any interest that justifies such coercion. Under its previous five-year concession agreements with Capital, the Port Authority leased the rental counter for a nominal fee per square foot plus a portion of its "gross revenues," defined as revenues generated from the counter.

> Gross revenues as used herein shall mean the total amount accruing to Agency by credit of services,

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[6] 137 N.E. 6, 8 (Ohio 1922). *See also City of Wooster v. Graines*, 556 N.E.2d 1163, 1166 (Ohio 1990) (quoting *Roettinger*, holding that rates collected through storm sewer utility may be used for statutory purposes only).

[7] OHIO REV. CODE ANN. § 4582.43 (West 1999) (emphasis added). *See* OHIO REV. CODE ANN. § 4582.31(V) (West 1999).

[8] 13 F. Supp. 2d at 650.

> materials or other merchandising, or from monies received or retained in fees and commissions by Agency from its operations *originating or concluding at the Airport*.[9]

But when it came time to negotiate the 1998 car rental concession agreements, the Port Authority sought to raise revenues by charging car rental companies in excess of the costs of services provided. Under the 1998 concession agreement—to last for ten years—on-Airport car rental concessionaires would pay as a privilege fee a percentage of "gross revenue," redefined to include local revenues.

> Gross Revenue means the total amount charged by any Concessionaire during an Agreement Year including any separately stated fees, surcharges and other charges, in connection with: (i.) Concessionaire's Rental Car Business under this Agreement; (ii.) any activities related directly or indirectly to that business; and (iii.) any other business of Concessionaire in the Operating Areas, in concessionaire's Designated Service Facility, or elsewhere at the Airport.[10]

"Designated Service Facility" included any and all of a company's facilities within two miles of the one facility a company actually designated for on-Airport business. Thus all a concessionaire's revenues from near the Airport would fall within "gross revenue."[11] Capital would be required to pay fees on the 40% of its revenues that it generated independent of the Airport, and thus face

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9 Appellant's Br. 8 (quoting Exh. 11, Section I.C., A.1164) (emphasis added).

10 Petition for Writ of Certiorari, App. H-57 to H-58 (draft Concession Agreement § 4.2.1).

11 *Id.* App. H-23 to H-24 (draft Concession Agreement § 2.2, defining "Designated Service Facility").

greater costs than its competitors in the local market. Capital thus faced a dilemma: if it wanted to avoid the privilege fee, it would have to either discontinue its local business or forfeit its counter—and its Airport customers.

The Port Authority cannot argue that the privilege fee simply covers costs of providing Capital the right to conduct business at the Airport. The 1998 concession agreement clearly indicates that the privilege fee is separate from the costs of providing any service to concessionaires, because it lists the privilege fee separately from the fees directly related to the Port Authority's costs.[12] The Port Authority even sought to hide the privilege fee from the eyes of consumers by prohibiting any reference to the privilege fee as such on consumers' bills.[13]

The Port Authority is empowered to charge rents and fees to cover the costs of services rendered. But the privilege fee by its terms is explicitly unrelated to the cost of any service or benefit the Port Authority provides the car rental companies. Therefore the privilege fee, which discriminates against car rental companies who serve Airport customers from an off-Airport facility, is arbitrary and irrational. Because the courts below have so departed from the usual course of judicial proceedings, this Court should grant the Petition and hear this case.

II. PRIVILEGE FEES COULD HAVE PARTICULARLY INVIDIOUS EFFECTS ON FAIR COMPETITION AMONG BUSINESSES IN THE MARKETS SURROUNDING PUBLICLY OPERATED AIRPORTS NATIONWIDE.

ACRA is concerned not just about Caiptal and the harm it suffers from this discriminatory privilege fee.

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12 *Id.* App. H-54 to H-55 (draft Concession Agreement § 4.1.1.2-4.1.1.6).

13 *Id.* App. H-145 to H-147 (draft Concession Agreement Exh. B Art. 4).

ACRA sees in this case a threat to car rental companies and all other businesses that contract with public airport authorities across this nation.

The larger threat in the Port Authority's action lies in the reasoning behind that action. The Port Authority contends that it may use its government-granted monopoly to charge businesses whatever it desires for access to Airport customers, and even to discriminate in what it charges particular businesses, despite what Ohio law permits it to charge, simply because some businesses will pay. Thus the Port Authority seeks to carve out of the Equal Protection Clause an exception for public airport authorities.

This abuse of power is analogous to a tying arrangement, an agreement by a party to sell one product on the condition that the buyer also purchases a different, or tied, product.[14] Such arrangements are so harmful to competition as to be *per se* unlawful under the antitrust laws.

> They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. . . . They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected.[15]

While the analogy is not precise, the principle is apt. To allow airport authorities nationwide to levy privilege fees

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[14] *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

[15] *Id.*

will allow them to condition access to their terminals on payment of profits earned in the unrelated local market. As this Court has observed, such arrangements "serve hardly any purpose beyond the suppression of competition." [16]

Every major airport in the United States enjoys a monopoly on access to airline passengers like the Port Authority's. If the Port Authority prevails here, there is no reason to think that other public authorities will not similarly seek to raise revenues through fees unrelated to the costs of services provided. And if the Port Authority is permitted to discriminate among car rental companies, there is no reason why it could not similarly discriminate among the members of other industries that it contracts with. The rulings below threaten the economic well-being of all those who do business with public transportation authorities across the United States.

The district court and the Sixth Circuit have given their blessing to a capricious form of discriminatory corporate taxation by an essential facility that is a government monopoly. This precedent could disrupt local economies across this nation. Thus this case presents a substantial question for review, and this Court should grant the Petition and review this arbitrary and irrational penalty.

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16 *Id.* (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 305-306 (1949)).

CONCLUSION

The Port Authority's privilege fee discriminates against Capital for no reason that is rationally related to a legitimate state interest. The danger in tolerating this practice is that other public airport authorities will similarly seek to raise revenues at the expense of free and fair competition in local markets. Therefore this Court should grant the Petition, issue the Writ, and hear this case.

Respectfully submitted,

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